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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES W. RAMSEY and JAMES W. KELLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

JEROME M. FEIT,
ANN T. WALLACE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-20a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 21a) was entered on June 10, 1976. On July 1, 1976, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to and including August 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether probable cause and a search warrant are required before customs officials may open an envelope entering the United States from abroad, when they suspect that the envelope contains smuggled goods.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 482, 19 U.S.C. 1582, and the pertinent portions of 19 C.F.R. Part 145 and 39 C.F.R. Part 61 are set out in App. C, *infra*, pp. 22a-27a.

STATEMENT

From November 1973 until January 1974, Sylvia Bailey and William Ward were principals in an international narcotics trafficking ring (App. A, *infra*, pp. 2a-3a). West German agents investigating Bailey and Ward intercepted trans-Atlantic telephone conversations between Bailey and respondent Ramsey during which narcotics were discussed (*id.* at 3a).

In late January 1974 Bailey and Ward moved the base of their operation to Thailand. Thai officials, alerted by West Germany, saw them mailing numerous envelopes. Five envelopes were inspected by Thai officials; one of the addresses was later linked to respondents. On February 2, 1974, Thai officials arrested Bailey and Ward and seized numerous sealed envelopes containing heroin.[1] Eleven of the envelopes bore Washington, D.C. addresses connected to respondents (*ibid.*).

Two days later, George Kallnischkies, a customs inspector in New York City who was unaware of these events, detected undeclared matter in eight envelopes en route from Thailand to four addresses in Washington, D.C. (App. A, *infra*, pp. 3a-4a). These envelopes were "rather bulky," and Inspector Kallnischkies believed that they contained merchandise rather than letters (Tr. 3-7, 25, 32).[2] He weighed one of them and found that it was three times the ordinary weight of an airmail letter (Tr. 8-9, 27). He opened this envelope and found, between two

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[1] Bailey and Ward have never been available in the United States for trial. App. A, *infra*, p. 2a n. 1.

[2] "Tr." and "2 Tr." refer to volumes one and two of the transcript of the suppression hearing on October 25, 1974.

pieces of cardboard, a plastic bag containing a white substance that he believed to be heroin. Based upon this discovery, he opened the other seven bulky envelopes, which appeared to have been addressed on the same typewriter as was the first envelope (Tr. 25).

Inspector Kallnischkies resealed the envelopes. Six of them were delivered to three addresses. Federal agents saw respondent Kelly collect the envelopes, rendezvous with respondent Ramsey, and give Ramsey a brown paper bag (App. A, *infra*, p. 4a). Respondents were arrested. The bag contained the six envelopes, $1,100 in cash, and material with which to dilute the heroin (*ibid.*).

Respondents were indicted for numerous offenses arising out of this transaction. They moved to suppress the heroin that had been discovered by Inspector Kallnischkies.[3] After an evidentiary hearing, the district court denied the motion from the bench (2 Tr. 43). Respondents then waived their right to a jury trial. The case was submitted on the basis of stipulated facts and exhibits. On December 20, 1974, the district court found respondents guilty of unlawful importation of heroin and of possession of heroin with intent to distribute it, in violation of 21

[3] It is not clear why respondents have standing to object to Inspector Kallnischkies' opening of the envelopes. The envelopes were not addressed to them and contained no correspondence. The government did not contend below that respondents lack standing, however, and we therefore have not presented it as a question for resolution by this Court. See *United States* v. *Santana*, No. 75-19, decided June 24, 1976, slip op. 3 n. 2.

U.S.C. 841(a) and 952(a). The court also found respondent Kelly guilty on one count, and respondent Ramsey guilty on three counts, of the unlawful use of a communication facility, in violation of 21 U.S.C. 843(b). Finally, the court found respondent Ramsey guilty of two firearms offenses.[4] Respondent Ramsey was sentenced to concurrent terms of imprisonment, the longest of which was 10 to 30 years. Respondent Kelly was sentenced to partially concurrent and partially consecutive terms aggregating 10 to 30 years' imprisonment.

A divided panel of the court of appeals reversed. Although it found Inspector Kallnischkies' seizure of the envelopes reasonable, it held that the envelopes could not be opened without probable cause and a warrant. The court acknowledged that border searches have traditionally been recognized as an exception to the warrant requirement of the Fourth Amendment (App. A, *infra*, pp. 5a-7a). It thought, however, that this exception was justified only by the exigencies attendant upon most border searches (*id.* at 7a); finding no exigencies compelling Inspector Kallnischkies to act without a warrant, the court concluded that he could not do so.

[4] These offenses—receiving and possessing a firearm as a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1), and receiving and possessing a pistol, in violation of 22 D.C. Code 3203—were the subject of a separate indictment. The weapons were found as a result of respondents' arrests and so are "fruit" of the discovery of the heroin. The convictions consequently must stand or fall with the heroin offenses.

The court distinguished between envelopes and larger containers, indicating that warrantless searches of the latter would be allowed with or without exigent circumstances. The court advanced four reasons for this distinction. First, only "limited kinds of contraband * * * can be concealed within a letter-sized envelope," so that it is less likely that an envelope, "rather than an automobile or a suitcase, contains contraband" (App. A, *infra*, p. 8a). Second, the court thought that officials using metal detectors, X-rays, and trained dogs could detect items smuggled in envelopes more readily than those concealed elsewhere (*ibid.*). Third, envelopes can be detained more readily than travellers while a warrant is being obtained (*id.* at 10a). Finally, the court thought that warrantless openings of envelopes would inhibit freedom of expression (*id.* at 11a-13a).

Judge Robb dissented. He would have followed the decisions of other courts of appeals that have allowed warrantless inspections of envelopes at the border (App. A, *infra*, pp. 19a-20a). In his view, the historical justification for border searches is sufficient to allow the opening of an envelope. He also questioned the consistency of the majority's position: observing that the majority would allow searches of people and packages, he argued that a package should not acquire greater security against inspection simply because it is smaller or is not carried by a person.

REASONS FOR GRANTING THE PETITION

Millions of envelopes enter the United States from overseas each year. Many of these envelopes are large, stiff or bulky, and they conceal their contents as well as does a cardboard box.[5] Unless customs officers have authority to inspect these envelopes, they will become hiding places for smuggled goods of all sorts. The court of appeals, by requiring probable cause and a warrant as a precondition to such an inspection, has created just such a possibility. We submit that its decision places unreasonable restraints upon customs searches. Moreover, this is a matter as to which uniform national rules are imperative, and there is thus a need for this Court to resolve the conflict among the circuits created by the decision below.

1. Inspector Kallnischkies inspects mail entering in New York City. His predicament illustrates the problems caused by the decision below. Under at least two cases decided by courts with jurisdiction over his place of employment, he may open envelopes without probable cause or a warrant. *United States* v. *Doe*, 472 F. 2d 982, 984-985 (C.A. 2) (dictum), certiorari denied *sub nom. Rodriquez* v. *United States*, 411 U.S. 969; *United States* v. *Swede*, 326 F. Supp. 533, 536 (S.D. N.Y.). Moreover, Inspector

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[5] The court of appeals' holding applies to all "international letter class mail" (App. A, *infra*, pp. 9a-10a and n.6), a category that includes packages weighing as much as 60 pounds for which the requisite amount of postage is paid. See 39 C.F.R. 22.1(b) and (c).

Kallnischkies once opened an envelope bound from Columbia to Woodhull, Illinois, and found that it contained cocaine. The court of appeals held that he acted properly. *United States* v. *Bolin*, 514 F. 2d 554 (C.A. 7).[6]

In this case he followed an identical procedure with envelopes bound from Thailand to the District of Columbia. The court of appeals held that his actions violated the Fourth Amendment because he lacked probable cause and a warrant. If the envelopes had been delivered in the Virginia or Maryland suburbs of the District, however, the search would have been upheld. *United States* v. *Milroy*, C.A. 4, No. 75-1675, decided March 2, 1976, certiorari denied, June 7, 1976 (No. 75-6479). Courts in many other destinations also would have upheld the Inspector's procedure. See *United States* v. *King*, 517 F. 2d 350, 352-353 (C.A. 5);[7] *United States* v. *Barclift*, 514 F. 2d 1073, 1074-1075 (C.A. 9), certiorari denied, 423 U.S. 842; *United States* v. *Beckley*, 335 F. 2d 86, 88-89 (C.A. 6) (dictum), certiorari denied *sub nom. Stone* v. *United States*, 380 U.S. 922.[8]

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[6] See also *United States* v. *Odland*, 502 F. 2d 148, 151 (C.A. 7), certiorari denied, 419 U.S. 1088.

[7] See also *United States* v. *Henritze*, 522 F. 2d 1279 (C.A. 5), certiorari denied, March 22, 1976 (No. 75-913).

[8] All of the cases cited except *Doe* and *Beckley* approve a warrantless opening of an envelope; *Doe* and *Beckley* approve the warrantless opening of packages, but both indicate that the opening of envelopes should be governed by the same standards.

The court of appeals acknowledged that it was creating a conflict among the circuits (App. A, *infra*, p. 6a). This conflict is undesirable. There is no reason why Inspector Kallnischkies should be required to vary his inspection procedures depending upon the destination of the envelope. Custom officials inspect incoming items at 136 ports of entry (39 C.F.R. 61.3), and each port may receive items bound for any destination in the United States. The procedures used by these inspectors, and by the Postal Service, should be uniform. A disparity of practices may substantially weaken the customs inspection system by permitting smugglers to send their goods freely to destinations where probable cause and a warrant are required, bypassing destinations where courts have approved present procedures.[9] The conflict among the circuits therefore requires resolution by this Court.

2. Congress has explicitly endowed the Customs Service with the power it exercised here. A statute first enacted by the same Congress that proposed the Bill of Rights (see *Boyd* v. *United States*, 116 U.S. 616, 623) provides that a customs officer may search "any trunk or envelope * * * in which he may have

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[9] The Postal Service has notified the Customs Service that it will not turn over for customs inspection mail bound for the District of Columbia unless the Bureau complies with the procedures required by the court below. The Customs Service informs us that compliance with the required procedures is impossible with current personnel (62 inspectors in 26 major customs offices) and would be impractical even with an expanded staff.

reasonable cause to suspect there is merchandise which was imported contrary to law" (19 U.S.C. 482). See also 19 U.S.C. 1582. Pertinent regulations provide that mail originating outside the United States is subject to customs inspection and that a warrant is required only if an inspector believes it necessary to read particular correspondence. See 19 C.F.R. Part 145 and 39 C.F.R. Part 61. (These statutes and regulations are set forth at App. C, *infra.*)

Although the judgment of Congress is entitled to a "strong presumption of constitutionality," especially when it turns upon what is "reasonable" (*United States* v. *Watson*, 423 U.S. 411, 416; *United States* v. *Di Re*, 332 U.S. 581, 585), the court of appeals dismissed the statutes as "of no consequence" (App. A, *infra*, p. 13a n. 7). We believe that the statutes are entitled to deference. If two statutes and an entire set of regulations are to be struck down as unconstitutional, this Court should make that judgment.

3. Article I, Section 8, clauses 1 and 3 of the Constitution grant Congress the power to regulate commerce with foreign nations and to lay and collect duties. *United States* v. *12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125-126. Because the power thus granted includes the power to "exclude merchandise at [Congress'] discretion" (*Brolan* v. *United States*, 236 U.S. 216, 219; *Weber* v. *Freed*, 239 U.S. 325, 329), it also includes the power to condition the entry of all things into the country upon exposure to the routine, suspicionless inspec-

tions necessary to prevent the importation of prohibited things. *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272. "Travellers may be * * * stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U.S. 132, 154.

The right to inspect is not diminished simply because a person and his goods enter this country by separate routes. Searches of containers at the border for smuggled goods "are totally different things" from inland searches. *Carroll, supra*, 267 U.S. at 149 (quoting from *Boyd* v. *United States, supra*, 116 U.S. at 623). This Court has made it clear many times that there is no need for a warrant or even suspicion for a border search. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-884 (opinion of the Court), *id.* at 887 (Rehnquist, J., concurring); *Almeida-Sanchez* v. *United States, supra*, 413 U.S. at 273; *United States* v. *12 200-ft. Reels, supra*, 413 U.S. at 125; *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 376; *Carroll* v. *United States, supra*, 267 U.S. at 153-154; *Boyd* v. *United States, supra*, 116 U.S. at 623.

Such searches are justified by force of circumstance. Inspections at random, or on suspicion not amounting to probable cause, are necessary implements of the enforcement of the customs laws. Bulky envelopes and packages arriving from abroad rarely announce that they contain contraband, and customs officers rarely know enough about them to have even

a fair idea of their contents. To require probable cause as a condition of inspection would be, in most instances, to guarantee success to smugglers. And, because "no Warrants shall issue, but upon probable cause," no warrant could be obtained to authorize an ordinary border search.[10]

The searches are also justified by force of history.[11]

[10] Although the court of appeals held that an envelope cannot be inspected without probable cause, it also indicated that it would take a flexible view of probable cause (App. A, *infra*, pp. 13a-14a n. 8). It is difficult to know what to make of this. Is it enough that the inspectors have probable cause to believe that the envelope contains something other than a letter? If so, the requirement is practically meaningless, since only those kinds of envelopes are presently opened by Customs. But if something more is necessary, then the chances of successful smuggling are dramatically increased.

[11] As this discussion indicates, we disagree with the court of appeals' belief that only exigent circumstances justify warrantless inspections, and that border searches are permissible only insofar as they are required by exigencies. The border search rules stand on their own practical and historical footing, as do the rule allowing seizure of things found in plain view (*United States* v. *Harris*, 390 U.S. 234, 236) and the rule allowing warrantless arrests (*United States* v. *Watson*, *supra*). Neither turns upon exigent circumstances. Indeed, the court of appeals disregarded its own reasoning by indicating that it would uphold warrantless inspections of packages, even in the absence of exigent circumstances.

Moreover, this Court has recognized (*United States* v. *Robinson*, 414 U.S. 218) that searches falling within an exception to the Warrant Clause can be conducted whether or not they satisfy the rationale that originally justified the exception. If it were otherwise, officials would not have the certainty that is necessary in carrying out their duties. The court of appeals' approach, which requires essentially a case-by-case analysis to determine whether a particular border search "really" was necessary under the rationale for border searches as a class, would deprive officials of this necessary certainty.

Border searches of envelopes, trunks, and people were accepted practices at the time of the adoption of the Constitution and the propriety of the practice has remained virtually unquestioned to this day. Mr. Justice Holmes has reminded us that "a page of history is worth a volume of logic" (*New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349). Here, in Mr. Justice Frankfurter's words, "there is not merely 'a page of history,' * * * but a whole volume" (*Galvan* v. *Press*, 347 U.S. 522, 531). That history may not fix the meaning of the Fourth Amendment, but it shapes its interpretation, and courts are not free to disregard its claims.[12]

4. The rationales for border searches apply with equal force to inspections of envelopes. As Judge Robb observed (App. A, *infra*, p. 19a), "that the contents to be inspected are enclosed in an envelope, rather than by wrapping paper and twine, cannot be of critical significance." The search of a person crossing the border involves an intrusion far greater than the brief inspection of an envelope; it would be ironic if the less intrusive search required both probable cause and a warrant, while the more intrusive search required neither.

[12] The court of appeals wrote that the argument from history has been "squarely rejected" by this Court (App. A, *infra*, p. 7a n. 5). It has not. See *United States* v. *Watson*, *supra* (relying upon history to approve felony arrests without a warrant).

The fact that many envelopes contain letters adds nothing to the analysis. Letters also may be enclosed in packages or carried on the person, yet the court of appeals would allow inspection of packages and people. Conversely, envelopes may and often do carry only merchandise. That was so here; the six envelopes delivered to respondents contained only cardboard and heroin.

The court of appeals' concern for personal correspondence is a legitimate one. The Customs Service regulations provide (19 C.F.R. 145.3) that no correspondence can be read without a warrant. But there has been no showing in this case that customs inspectors read or censor mail. The Postal Service refers an incoming envelope to the Customs Service for inspection only if the envelope appears to contain things other than, or in addition to, written matter. The Customs Service has informed us that between July 1975 and February 1976 its inspectors opened less than one percent of envelopes so referred. This regular administrative procedure is susceptible of judicial scrutiny after the fact; there is no need for a warrant to ensure that the administrative conduct is reasonable. Cf. *United States* v. *Martinez-Fuerte*, No. 74-1560, decided July 6, 1976.

We further note in this connection that the court of appeals has significantly mischaracterized the issue presented by this case. The court speaks of "the practice of routinely opening mail" (App. A, *infra*,

p. 11a) and, again, of "[r]outine opening of international mail" (id. at 13a), as though it is regular practice to open international letter-class mail. In fact, the statute authorizes warrantless openings of incoming envelopes only when there is "reasonable cause to suspect" that the envelope may contain merchandise being improperly imported, as there was in this case. There is no practice of "routine" opening without a warrant of envelopes that outwardly appear to contain only written matter. The important question that we ask this Court to decide in a manner reaffirming virtually unanimous prior judicial precedent concerns the right to open without a warrant, for purposes of customs inspection, incoming envelopes reasonably believed to contain merchandise of some sort.

In any event, respondents have not argued that *their* correspondence was read, nor could they, for the envelopes contained no correspondence. Whatever inhibitory effect customs inspections may have on others, respondents were not exposed to it. Nor is such an effect different in kind from that attending the inspection of all envelopes coming into a prison. "The possibility that contraband will be enclosed in letters" is sufficient to allow prison officials to open *all* envelopes. *Wolff* v. *McDonnell*, 418 U.S. 539, 577. The possibility that smuggled items will be enclosed in envelopes therefore should be sufficient to allow customs inspectors to open a carefully-selected group of envelopes that appear to contain things other than letters.

Finally, the search in the instant case was not of a wafer-thin aerogramme incapable of enclosing a foreign substance. The envelope here was bulky and stiff; it, no less than a cardboard box, could disguise its contents unless opened for inspection. To the extent that different standards should be applied to packages and envelopes, these envelopes, partaking of the concealing characteristics of packages, should be judged by the package standards.

The decision of the court of appeals would increase the complexity and diminish the effectiveness of the process of detecting smuggled goods at the border. The court was not entitled to substitute its judgment for that of Congress and the responsible executive officials unless the Fourth Amendment left it no alternative. We submit that the Fourth Amendment does not require either probable cause or a warrant for an inspection of envelopes at the border.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

JEROME M. FEIT,
ANN T. WALLACE,
Attorneys.

AUGUST 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1275
No. 75-1276

UNITED STATES OF AMERICA

v.

CHARLES W. RAMSEY, APPELLANT

No. 75-1691

UNITED STATES OF AMERICA

v.

JAMES W. KELLY, APPELLANT

Appeals from the United States District Court
for the District of Columbia
(Crim. 74-623)

Argued December 10, 1975

Decided June 10, 1976

Before: McGowan, Tamm and Robb, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* McGowan.

Dissenting opinion filed by *Circuit Judge* Robb.

McGowan, *Circuit Judge*: Appellant Ramsey was convicted in the District Court on one count of unlawful importation of heroin (21 U.S.C. § 952(a) (1970)); three counts of unlawful use of a communication facility (21 U.S.C. § 843(b) (1970)); one count of possession of heroin with intent to distribute (21 U.S.C. § 841(a) (1970)); one count of unlawful receipt and possession of a firearm (18 U.S.C. § 1202 (a)(1) (1970)) and one count of unlawful possession of a pistol (22 D.C. Code § 3203 (1973)). Appellant Kelly was convicted on one count of unlawful importation, one count of unlawful use of a communication facility, and one count of possession with intent to distribute. On appeal, a number of allegations of error are made, one of which we find to be of merit, and we therefore reverse the convictions.

I

The case was tried to the District Judge on the basis of a lengthy stipulated record which we need summarize only in broad outline. In November of 1973, Sylvia Bailey and William Ward,[1] who resided

[1] Bailey and Ward were indicted with appellants, but have never been available in the United States for trial.

in West Germany, were engaged in international narcotics trafficking. They were subjected to electronic surveillance pursuant to a West German court order, and the wiretap led to a search of Ward at the Munich Airport in December of 1973, which turned up no drugs but $10,000 in cash. The wiretap was reactivated in January of 1974, and among the calls intercepted were incriminating trans-Atlantic conversations concerning narcotics between Bailey and appellant Ramsey.

Ward and Bailey travelled to Thailand in late January of 1974, and Thai officials were alerted to their presence by West German agents. The Thai officials placed them under surveillance, and observed Ward mailing letter-sized envelopes in six different mail boxes. Five of these envelopes were recovered, and among the addresses they bore was a mail drop in Washington, D.C. later linked to appellants. On February 2, 1974, Bailey and Ward were arrested in their hotel room in Thailand, and seized in the raid were all the ingredients for the narcotics importation scheme. Among the items so obtained were numerous sealed, heroin-filled envelopes, eleven of which bore Washington, D.C. addresses with which appellants were later found to have a connection.

Two days later in New York—independently and without any knowledge of the foregoing—Customs Inspector George Kallnischkies seized and, proceeding without a warrant, opened eight envelopes found to contain heroin. The envelopes had been mailed from Thailand and were destined for four addresses in the

Washington area. These envelopes were resealed and forwarded to Washington, and six were delivered to three addresses. Federal agents witnessed Kelly retrieve all six envelopes, rendezvous with Ramsey at the latter's residence, and transfer to Ramsey a brown paper bag. The agents moved in and arrested both men. The paper bag was found to contain six letters, $1,100 in cash, and cutting material. Also seized from Ramsey was a notepad with Bailey's phone numbers and addresses. The next day, in executing a search warrant on Ramsey's residence, the agents recovered, *inter alia*, the two pistols for whose unlawful possession Ramsey stands convicted and a cardboard sheet with Sylvia Bailey's phone numbers.

II

The critical issue in this case, in our view, is the warrantless search of the eight envelopes at the New York Post Office. Those envelopes, and a great deal of evidence deriving from their seizure, were presented before the trier, and no attempt is or could fairly be made by the Government to argue that, if the seizure was illegal under the Fourth Amendment, the error was harmless as to any of the counts. As we proceed to develop, we believe that the opening of these letters without resort to a warrant procedure was a constitutional violation, and the use at trial, over the objection of appellants, of evidence obtained thereby requires overturning the convictions.[2]

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[2] The Government remains free, of course, to retry appellants if there exists sufficient evidence, aside from the illegally seized envelopes and fruits of that seizure, to warrant such a course.

Inspector Kallnischkies was a supervisor of Customs Service Inspectors dealing with international letter class mail (the category closest to domestic first class mail). He testified that foreign airmail mail coming to the New York General Post Office is placed on a conveyor belt for sorting, and during that process he would remove any items that looked "suspicious." Tr. of October 25, 1974 Hearing, at 6. In this instance, he removed eight envelopes from the belt because they were from Thailand—a known source of heroin—and were bulky.[3] *Id.* at 7. He weighed one of the envelopes and found it to weigh 42 grams, roughly three times the weight of a normal letter. *Id.* at 8-9. The envelope also "felt like there was something in there. . . ." *Id.* at 9. He then opened one envelope and found a plastic bag containing white powder between some pieces of cardboard. Upon testing, the powder was found to be heroin. The other envelopes also were found to contain heroin.

The Government would place this search within the border search exception to the warrant requirement. The view that *packages* moving through international mail fall within the border search exception has been

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[3] Kallnischkies testified that often he could feel cardboard inside an envelope, and that if there is a bag of heroin concealed inside, shaking the envelope will cause the bag to fall into one particular spot. Tr. at 33. He could not specifically say in the case in question that he felt anything other than the bulkiness of the envelope. *Id.* at 34.

uniformly adopted by courts confronting that question. *E.g.*, *United States* v. *Doe*, 472 F.2d 982, 984 (2d Cir.), *cert. denied*, 411 U.S. 969 (1973); *United States* v. *Galvez*, 465 F.2d 681, 687 (10th Cir. 1972); *United States* v. *Beckley*, 335 F.2d 86, 88-89 (6th Cir. 1964), *cert. denied*, 380 U.S. 922 (1965); *United States* v. *Swede*, 326 F. Supp. 533, 535-36 (S.D.N.Y. 1971); *United States* v. *Sohnen*, 298 F. Supp. 51, 54-55 (E.D.N.Y. 1969). The last-mentioned court, (Weinstein, D.J.), indicated that it might reach a different result where letters, rather than packages, were involved. *United States* v. *Sohnen*, *supra*, at 55.

However, two circuits have squarely ruled that international letter mail, like international package mail, does fall within the border search exception. *United States* v. *Bolin*, 514 F.2d 554, 557 (7th Cir. 1975), *citing United States* v. *Odland*, 502 F.2d 148, 151 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974); *United States* v. *Barclift*, 514 F.2d 1073, 1074-75 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 842 (1975). *See also United States* v. *Francis*, 487 F.2d 968 (5th Cir. 1973), *cert. denied*, 416 U.S. 908 (1974).[4] Both of these circuits rested their analysis

[4] At page 9 of its brief, the Government notes that the Supreme Court has refused to limit the power to search international mail upheld in *Odland*, *Francis*, and *Doe*. The inference that we are unmistakably invited to draw is that the Supreme Court's denial of certiorari should be viewed as an endorsement of the result and perhaps the reasoning of these cases. That is an invitation which, as we ought not to have to remind the Government, conflicts with the elementary theory of certiorari review.

on nothing more than the assertion that no meaningful difference could be drawn between the entry of mail into the United States and the entry of automobiles, baggage, individuals, or packages.

In our view, that assertion is sustainable only by embracing the most sweeping concept that the "integrity of our borders" requires that all objects crossing them may be searched at the whim of the Government. If, in fact, we look to the rationale of the border search exception, we find that it is based upon (1) the impracticability of requiring a warrant given the huge volume of items moving across the border likely to contain contraband, *e.g.*, *United States* v. *Doe*, *supra*, at 982-83; *Morales* v. *United States*, 378 F.2d 187, 190 (5th Cir. 1967), and (2) the difficulty of obtaining a warrant when the subject of the search is mobile, as a car or person, *Carroll* v. *United States*, 267 U.S. 132, 153 (1925).[5]

[5] Other rationales for this longstanding exception have been suggested. One, the theory that a well-established history of warrantless searches can exempt the practice in question from the ordinary requirement of a warrant, was squarely rejected in Camara v. Municipal Court, 387 U.S. 523 (1967), in which the Court ignored the argument based on history on which it had relied eight years earlier in Frank v. Maryland, 359 U.S. 360 (1959). A second suggestion, that travelers have a less strong expectation of privacy and hence warrantless searches are acceptable, *see, e.g.*, United States v. Sohnen, *supra*, at 55; Note, *Border Searches and the Fourth Amendment*, 77 YALE L. J. 1007, 1012 (1968), is largely circular, assuming the existence of such searches as part of the justification for them; and, in any event, the rationale would not apply to searches of letter class mail, see pp. [11a-13a] *infra*.

When we compare letters to persons or automobiles it becomes apparent how little force this rationale carries when applied to letters. There are limited kinds of contraband that can be concealed within a letter-sized envelope; the decided cases appear to involve almost exclusively narcotics, although it is perhaps conceivable that small pieces of jewelry, small quantities of precious metals, or currency might also be concealed. There is, therefore, a smaller likelihood in the first instance that a letter, rather than an automobile or a suitcase, contains contraband. Moreover, as far as the central problem of narcotics is concerned, the Customs Service can effectively use trained dogs who can detect the smell of contraband drugs. *See, e.g., United States* v. *Mitchell*, 525 F.2d 1275, 1277 (5th Cir. 1976); *United States* v. *Fulero*, 498 F.2d 748 (D.C. Cir. 1974) (per curiam); *United States* v. *Feldman*, 366 F. Supp. 356, 358 (D. Hawaii 1973). Similarly, X-ray examination, or metal detectors like those currently in use at airports, could detect precious metals or jewelry. *See, e.g., United States* v. *Chiarito*, 507 F.2d 1098, 1099 (5th Cir.) (per curiam), *cert. denied*, 423 U.S. 824 (1975); *United States* v. *Sohnen, supra*, at 53. These techniques could screen out a large percentage of otherwise suspicious mail that, under current practice, is routinely opened The dimensions of the remaining problem of smuggling in letter-sized envelopes are of

a different order than those of other kinds of traffic across the border.[6]

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[6] There is, of course, no ready line available to distinguish letters from packages; the distinction is one of degree. We are satisfied that the envelopes in this case, five of which measured roughly seven by five inches and a sixth of which measured nine by four and one-half inches, Government Exhs. 35-40, were in size and appearance closer to the letter end of the spectrum and fell outside of the border search exception.

The Postal Regulations currently limit international letter class mail to pieces not in excess of four pounds (except that for Canada there is a sixty pound limit) and with a maximum length of 24 inches and a maximum length, breadth and thickness, combined, of 36 inches. 39 C.F.R. §§ 22.1(b), (c)(1) (1975). In our view, the Government could be sure of complying with the Fourth Amendment by treating all international letter class mail as outside the border search exception. It might be objected that many pieces within that class are much more like "packages" than "letters," and that therefore a narrower class of items outside the exception must be defined. That point surely carries force, but the difficulty is most easily solved in the first instance by governmental attempts to formulate a dividing line that more appropriately separates "packages" and "letters." To be sure, even the most acceptable definition will be arbitrary at the margin, as is true of most difficult line-drawing problems. But that presents no reason for drawing no line at all and thereby giving no weight whatsover to the important privacy and expressive interests. *See* Haddock v. Haddock, 201 U.S. 562, 631-32 (1906) (Holmes, J., dissenting) ("I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worst for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis.") And in most cases, a piece of mail will clearly fall on one side of a common sense dividing line between "letters" and "packages." *See, e.g.*, Tr. of Oct. 25, 1974 Hearing, at 23.

[Footnote continued on page 10a]

Furthermore, suspicious-looking letters (and, to be sure, packages as well), unlike more mobile automobiles or travellers, can easily be detained to permit further examination (as with dogs, magnetometers, or X-rays) or to obtain a warrant. In *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), the Supreme Court unanimously upheld the authority of officials to detain first class mail for a period of 29 hours while they investigated suspicious circumstances and obtained a search warrant. Given this holding, it would appear to be an *a fortiori* case for Customs Inspectors to detain *international* letter mail for a reasonable period in which to investigate and, if appropriate, to obtain a warrant.

It thus seems that searches of international letter mail at best strain the rationale of the border search exception. Like all exceptions to the warrant requirement, *see generally, e.g., United States* v. *United States District Court*, 407 U.S. 297, 318 (1972); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971); *Jones* v. *United States*, 357 U.S. 493, 499 (1958), the border search exception must be carefully and narrowly drawn. The Supreme Court has in recent years twice declined to take an expansive view of the border search exception or the authority

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[6] [Continued]

We believe that a careful attempt to define subclasses of international mail by the Government, so as to clearly separate "packages" from "letters," can provide sufficient certainty; and in cases where uncertainty persists, the Government can deal with it by avoiding brinksmanship and instead taking the preferred course of seeking a warrant.

of the Border Patrol. *See United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973). And as in the Court's most recent decision, in the instant case we are "not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic." *United States* v. *Brignoni-Ponce*, *supra*, at 883.

Finally, and probably most important, letter mail is a vital means of communication in our society. Letters express the most important and sensitive of our personal, familial, political, professional, and financial affairs. They implicate both our deepest privacy and our interest in free expression, far more than packages or suitcases or automobiles. In the words of Justice Holmes, "the use of the mails is almost as much a part of free speech as the right to use our tongues." *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting), *quoted with approval in Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971), *and United States* v. *Van Leeuwen*, *supra*, at 251.

Even if the ordinary practice of the Customs Service is not to read the mail that is opened, *see* note 9 *infra*, mere knowledge on the part of individuals of the practice of routinely opening mail inhibits the exercise of free speech. *See Procunier* v. *Martinez*, 416 U.S. 396, 423 (1972) (Marshall, J., concurring); *cf. Talley* v. *California*, 362 U.S. 60, 65 (1960); *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). And the Supreme Court has indicated that limits on search

and seizure must be especially strong where First and Fourth Amendment values converge. *See, e.g.*, *United States* v. *United States District Court, supra,* at 313-14; *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965).

The Court has also noted, with reference to the need to enforce Fourth Amendment protections, that "[h]istory abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies." 407 U.S. at 314. The recent disclosures about the widespread illegal searches of mail by United States intelligence agencies, *see, e.g.*, REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES [THE ROCKEFELLER COMMISSION], June 1975, at 101-15, 168; S. REP. No. 755, 94th Cong., 2d Sess., Book II, at 12, 17, 38, 62, 107-08 (1976); *id.*, Book 3, at 559-677; *Hearings before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities,* 94th Cong., 1st Sess., Vol. 2, at 1-2, 15-16, 51-63, 66, 76 (1975); *id.*, Vol. 4, at 2, 4, 6-7, 10-11, 21-22, 31-35, 38, 43, 148, 150, 163; *id.*, Vol. 6, at 202-06, 367, highlight the importance of the Supreme Court's observation. The Supreme Court has also stated, as one reason supporting its requirement that warrants be obtained for electronic surveillance related to the domestic aspects of national security, that "[b]y no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens

cannot occur." *United States* v. *United States District Court, supra,* at 321. Routine opening of international mail presents the same threat to First Amendment interests, and enforcing the protections of the Fourth Amendment can provide law-abiding citizens with the same important assurance.

It thus appears that there is not a sufficient need, and there is too great a risk to personal privacy, to extend the border search exception to permit unrestrained opening of international mail.[7] We believe that the values protected by the First and Fourth Amendments demand that, before international letter mail is opened, a showing of probable cause[8] be made

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[7] The fact that the search in this case might be authorized by 19 U.S.C. § 482 (1970) is of no consequence, for it is well established that "'no Act of Congress can authorize a violation of the Constitution.'" United States v. Brignoni-Ponce, *supra,* at 877, *quoting* Almeida-Sanchez v. United States, *supra,* at 272.

[8] Adherence to a probable cause standard should not hamstring the Government; indeed, we believe that the facts in this case are such that, had they been presented to a magistrate, issuance of a search warrant permitting opening of the envelopes would have been appropriate. Here, as elsewhere, "[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949); *accord, e.g.*, Spinelli v. United States, 393 U.S. 410, 419 (1969):

> . . . we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964); . . . that in judging probable cause issuing magistrates are not to be con-

to and a warrant [9] secured from a neutral magistrate.

Any suggestion that adherence to the warrant requirement would serve no purpose in a case like the one at bar cannot be sustained. If the suggestion is directed merely against the clear recognition of the independent force of the Fourth Amendment's warrant clause, it cannot be persuasive. And there are at least three distinct functions that a warrant procedure would serve. First, by requiring that the inferences to which law enforcement officials are entitled be drawn by neutral magistrates rather than by officers in the heat of duty, *see Johnson* v. *United States*, *supra*, at 13-14, it helps to limit unjustified intrusions upon the private and communicative material con-

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fined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965) . . . .

A by no means exclusive list of facts that tend to establish probable cause would be: the size of the letter; whether inspection by X-ray or sniffing by a trained dog corroborates any suspicion; whether feeling the package from the outside gives reason to suspect contraband; the country of origin; an unusual and suspicious address or return address; an unusual number of letters sent from and/or to the same address within a short period of time; a reasonable basis to believe that the sender or recipient is engaged in smuggling; and so forth.

[9] Such warrants would, of course, almost always be limited to inspecting the mail for contraband and would not authorize the reading of any communication contained inside. 19 C.F.R. § 145.3 (1975) currently prohibits the reading of correspondence in sealed letter mail absent a warrant specifically authorizing that action, although it appears that there is no sanction accompanying that prohibition.

tained in letter mail. Second, it creates a record of the circumstances justifying an opening before the search occurs; this record minimizes the burden of *post facto* judicial review, *United States* v. *United States District Court*, *supra*, at 321, and sharply limits the possibility that officials will attempt to justify a search by what it turns up rather than what was known beforehand, *see*, *e.g.*, *United States* v. *Di Re*, 332 U.S. 581, 595 (1948). Inspector Kallnischkie's inability to remember precisely the basis upon which he determined to open the letters in question, *see* note 3 *supra*, illustrates the importance of this purpose.

Finally, establishment of a warrant machinery is a bulwark against the enlistment of mail openings not on behalf of responsible law enforcement, but rather to serve other, less commendable purposes. In *Almeida-Sanchez*, the Supreme Court reminded us of Justice Jackson's words shortly after returning from the Nuremberg trials:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

413 U.S. at 274, *quoting Brinegar* v. *United States*, 338 U.S. 180 (1949) (Jackson, J., dissenting). To advert again to the documented abuses by American

intelligence agencies in conducting mail searches does not reflect an obsession with current headlines, but rather highlights the importance of our duty to enforce the Fourth Amendment's protection of individual privacy and security.[10]

The Government has suggested that a warrant requirement would be impracticable, but there is absolutely nothing in the record to support this assertion. No proof has been adduced to show, and we have no reason to believe, that using X-ray inspection, metal detectors, specially trained dogs, and the like to dispel suspicion, raised by external appearance, that a letter contains narcotics, the remaining number of pieces of suspicious-looking letter mail is overwhelming. Moreover, a warrant procedure need not be unduly burdensome. A Customs Inspector could each morning display to a magistrate letters from the previous day's mail that he wished to open and indicate his reasons for so wishing; conceivably, the warrant procedure could be conducted entirely orally so long as a complete record was maintained; the Government could station a magistrate on a regular full or part-time basis at such centers as the New York Post

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[10] As Judge Prettyman noted many years ago,

> "We are dealing with doctrines and not with the presumable taste and sense of individual officials. Maybe none of these examples would ever occur. But the question before us is not whether they would happen but whether they legally could."

District of Columbia v. Little, 178 F.2d 13, 18-19 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

Office, where the volume of mail is heaviest. Other techniques both to facilitate examination of letters short of opening them and to streamline the warrant process might be devised.

In light of all of these seemingly feasible alternatives, we are unpersuaded by the Government's argument. Indeed, that argument is seriously compromised by the fact that, after the seizure in New York of the eight envelopes, officials at the Washington, D.C. Post Office were alerted; and when they intercepted three similar envelopes, *they sought and obtained a search warrant*. The course they chose to take strikes us as responsive to the Supreme Court's repeated admonitions that the warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency," *Coolidge* v. *New Hampshire*, *supra*, at 481; that the inconvenience and delay involved in obtaining a warrant are "never very convincing reasons" for failing to obtain one, *Johnson* v. *United States*, *supra*, at 15; that "the Constitution recognizes higher values than speed and efficiency," *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972); and that

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Almeida-Sanchez v. *United States*, *supra*, at 273.

The fact that the authorities locally in this jurisdiction observed, apparently without difficulty, the warrant requirement in like circumstances underscores the lack of cogency in apellees' suggestion that we are faced with one of those relatively few instances in which adherence to the warrant requirement is genuinely impracticable. There is no question that international letter mail presents a serious threat to effective drug law enforcement. But successful containment of that threat does not require abandonment of the Fourth Amendment.

The judgments of conviction are reversed and the cases remanded to the District Court for further proceedings consistent herewith.

It is so ordered.

ROBB, *Circuit Judge, dissenting*: I regret that I am unable to join in the thoughtful and scholarly majority opinion. A few words will indicate the reasons for my dissent.

Searches classified as border searches have always been free of both the warrant and the probable cause requirements of the Fourth Amendment. *Boyd* v. *United States*, 116 U.S. 616, 623 (1886); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (Majority Op.), 287-88 (Dissenting Op.) (1973); *United States* v. *Beckley*, 335 F.2d 86 (6th Cir. 1964), *cert. denied, sub nom., Stone* v. *United States*, 380 U.S. 922 (1965); *See Zweibon* v. *Mitchell*, 170 U.S. App. D.C. 1, 38-39, n.93, 516 F.2d 594, 631-32, n.93 (1975).[1] This means that a traveller and his luggage and effects may be subjected to a reasonable search, without a warrant, when he crosses the border. The search may of course extend to packages he is carrying, and I think he may reasonably be required to open a sealed envelope carried in his pocket or handbag; that the contents to be inspected are enclosed in an envelope, rather than by wrapping paper and twine, cannot be of critical significance. If I am right

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[1] Citing Camara v. Municipal Court, 387 U.S. 523 (1967) the majority suggests that the Supreme Court has abandoned "the argument based on history". The Camara case however involved a warrantless entry by a housing inspector in San Francisco; it did not involve a border search. The opinion for the Court was written by Mr. Justice White. In Almeida-Sanchez v. United States, 413 U.S. 266, 287-88 (1973) Mr. Justice White, dissenting, forcefully stated and approved the historical underpinnings of border searches.

about this then I think a sealed envelope acquires no additional protection or immunity from search because it moves through international mail, rather than in a traveller's luggage or on his person. There is no more reason to require a warrant in one case than in the other.

The majority argues that warrants authorizing the opening of letter mail may be obtained with ease. Yet this argument applies equally to packages and envelopes, and the majority does not deny that packages crossing the border in the mail may be opened without a warrant. Furthermore, the First Amendment considerations emphasized by the majority apply also to packages, for writings of a sensitive and personal nature, such as diaries, political tracts, and the like may be transmitted in wrappings rather than envelopes.

From what has been said it follows that I agree with the decisions of the circuit courts of appeals for the seventh and ninth circuits in *United States* v. *Bolin*, 514 F.2d 554, 557 (7th Cir. 1975); *United States* v. *Odland*, 502 F.2d 148, 151 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974); and *United States* v. *Barclift*, 514 F.2d 1073, 1074-75 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 842 (1975). Unless and until the Supreme Court repudiates those decisions I would not do so.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975
Criminal 74-623

No. 75-1275 and 75-1276
UNITED STATES OF AMERICA
v.
CHARLES W. RAMSEY, APPELLANT

No. 75-1691
UNITED STATES OF AMERICA
v.
JAMES W. KELLY, APPELLANT

Appeals from the United States District Court for the District of Columbia

Before: MCGOWAN, TAMM and ROBB, Circuit Judges

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the convictions appealed from in these causes are reversed and these cases are hereby remanded to the District Court for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 10, 1976

Opinion for the Court filed by Circuit Judge McGowan.

Dissenting opinion filed by Circuit Judge Robb.

[Filed Jun. 10, 1976, United States Court of Appeals for the District of Columbia Circuit
George A. Fisher, Clerk]

APPENDIX C

1. Section 3 of the Act of July 18, 1866, 14 Stat. 178, 19 U.S.C. 482, provides in relevant part:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine * * * any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; * * *.

2. Section 582 of the Act of June 17, 1930, 46 Stat. 784, 19 U.S.C. 1582, provides in relevant part:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage * * *; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

3. 19 C.F.R. Part 145 provides in relevant part:

* * * * *

§ 145.1 Definitions.

The following are general definitions for the purposes of part 145:

(a) *Mail.* "Mail" or "international mail" means both Postal Union mail and parcel post, as those terms are construed in 39 CFR Part 12.

(b) *Letter mail.* "Letter mail" means letters and letter packages in Postal Union mail.

(c) *Package.* "Package" means any parcel, packet, envelope, or other similar container, whether sealed or unsealed, arriving in the international mail.

§ 145.2 Mail subject to Customs examination.

All mail originating outside the Customs territory of the United States, whether sealed or unsealed, is subject to Customs examination, except:

(a) Mail known or believed to contain only official documents addressed to officials of the U.S. Government;

(b) Mail addressed to Ambassadors and Ministers (Chiefs of Diplomatic Missions) of foreign countries; and

(c) Letter mail known or believed to contain only correspondence or documents addressed to diplomatic missions or the officers thereof, or to international organizations designated by the President as public international organizations pursuant to the International Organizations Act (see § 148.87(b) of this chapter). Mail, other than letter mail, addressed to such designated international organizations is subject to Customs examination except where the organization certifies under its official seal that such mail contains no dutiable or prohibited articles. Any Customs examination made shall, upon request of the addressee international organization, take place in

the presence of an appropriate representative of that organization.

§ 145.3 Reading of correspondence prohibited.

No Customs officer or employee shall read or authorize or allow any other person to read any correspondence contained in sealed letter mail of foreign origin unless a search warrant has been obtained in advance from an appropriate judge or U.S. magistrate which authorizes such action.

§ 145.4 Dutiable merchandise without declaration or invoice, prohibited merchandise, and merchandise imported contrary to law.

(a) *Subject to seizure and forfeiture.* When, upon Customs examination, a package from abroad is found to contain merchandise subject to duty or tax, and the package is not accompanied by an appropriate Customs declaration and invoice or statement of value required by § 145.11, or is found to contain material prohibited importation or imported contrary to law, the merchandise is subject to seizure and forfeiture.

* * * * *

4. 39 C.F.R. Part 61 provides in relevant part:

§ 61.1 What is subject to examination.

All mail originating outside the customs territory of the United States is subject to customs examination, except (a) mail addressed to Ambassadors and Ministers (Chiefs of Diplomatic Missions) of foreign countries, (b) letter mail known or believed to contain only correspondence

or documents addressed to diplomatic missions or the officers thereof, or international organizations designated by the President as public international organizations pursuant to the International Organizations Immunities Act, and other mail addressed to such international organizations pursuant to instructions issued by the Department of the Treasury, and (c) mail known or believed to contain only official documents addressed to officials of the U.S. Government.

§ 61.2 Separation points.

(a) *Exchange offices.* Mail believed to contain matter liable to customs duty or believed to contain prohibited matter is submitted immediately to local customs officers, except when exchange offices are authorized to redispatch such mail to designated distribution offices for customs treatment thereat. Exchange offices which redispatch matter to be submitted to customs officers will attach Tag 10 (previously Label 81), a reusable pink slotted tag, bearing the words, "This sack contains mail Supposed Liable to Customs Duty," to the label holders or hasps of sacks or pouches.

(b) *Distribution offices.* Distribution offices will submit such mail to customs officers as soon as possible after receipt. The reusable tags, Tag 10, removed from sacks containing this mail will be returned periodically to the postmasters at New York, New Orleans, San Francisco, Seattle, or Miami, as may be appropriate from a geographical standpoint.

(c) *Priority treatment of airmail.* Airmail articles receive preferential customs treatment and are submitted to customs separately from sur-

face mail. Upon return from customs, dispatch will be by air if it will expedite delivery.

§ 61.3 Examination.

(a) *Registered mail.* The postmaster or other designated postal employee must be present when registered articles and registered parcels are opened by customs officers for examination. After customs treatment, the customs officer will repack and reseal the articles and parcels.

* * * * *

(c) *Failure to receive customs treatment.* Should an article known or supposed to be dutiable be observed at or en route to the office of address without having received customs treatment, forward it, labeled "For Customs Inspection," under cover to U.S. Customs Office at the nearest office listed in § 61.3(d), except that if registered matter is involved send to the Postmaster of the city where the customs office is located so the mail may be handled in accordance with § 61.3(a). Packages that have received customs treatment will bear an endorsement such as "Passed Free U.S. Customs" or the red adhesive U.S. Customs Service envelope that contains Customs Mail Entry, Form 3419. The U.S. Customs Service does not endorse "Passed Free of Duty" on printed matter (magazines, newspapers, circulars, and books). If printed matter is dutiable it will bear the red adhesive envelope that contains Customs Mail Entry, Form 3419.

* * * * *

§ 61.4 Repacking.

(a) *Responsibility of customs and postal employees.* Customs employees have responsibility for resealing or repacking mail of foreign origin following customs examinations. Postal employees accepting mail which has been in customs custody for examination must determine from external inspection whether it can safely bear further handling and transportation. Customs employees are responsible for restoring mail that is not in satisfactory condition.

(b) *Customs shipments in bad order.* Shipments found to be in bad order in transit or at the delivery office must be reconditioned by postal employees. Note bad order and evidence of rifling or damage on the address side of the wrapper over the signature of the employee.

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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES OF AMERICA,

Petitioner

—v.—

CHARLES W. RAMSEY and JAMES W. KELLY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 5, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES OF AMERICA,

Petitioner

—v.—

CHARLES W. RAMSEY and JAMES W. KELLY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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* A copy of the opinion of the court of appeals is reprinted as Appendix A to the petition for a writ of certiorari. The judgment of the court of appeals appears as Appendix B to the petition.

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 74-623

1. CHARLES W. RAMSEY
2. JAMES W. KELLY

21 U.S.C. 9552(a); 843(b); 841(a): Importation of a controlled substance; unlawful use of communicative facility; unlawful possession with intent to distribute a controlled substance.

RELEVANT DOCKET ENTRIES

Date	Proceedings
10/25/74	Indictment filed
11/1/74	Motion to suppress the physical evidence by United States Customs denied
11/18/74	Jury trial waived
11/22/74	Stipulated Record in part submitted
12/2/74	Remaining portions of Stipulated Record submitted
12/20/74	Judgment directing verdict of guilty be entered as to both respondents
2/14/75	Sentence imposed; Judgment entered as to defendant Charles W. Ramsey Notice of Appeal of Charles Ramsey filed
7/2/75	Sentence imposed; Judgment entered as to defendant James W. Kelly. Notice of Appeal of James W. Kelly filed

Date	Proceedings
3/21/75	Certified Original Record filed U.S.C.A.
6/10/76	Opinion for the Court filed by Circuit Judge McGowan Dissenting opinion filed by Circuit Judge Robb.
7/12/76	Copy of letter from Clerk, U.S. Supreme Court extending time to file petition for certiorari to August 9, 1976, filed.
8/9/76	Notice of filing petition for certiorari in S.C. No. 76-167 on August 5, 1976, filed
10/12/76	Certified copy of order from the Supreme Court granting petition for a writ of certiorari in S.C. # 76-167 on October 4, 1976, filed.

AFFIDAVIT IN SUPPORT OF A U. S. MAGISTRATE'S SEARCH WARRANT FOR THE PREMISES OF APARTMENT 2, 13-S STREET, N.E., WASHINGTON, D.C., DESCRIBED AS A MULTI-UNIT BRICK ROW HOUSE.

On February 1, 1974, information was received by the Washington District Office, Drug Enforcement Administration, from the Bangkok Regional Office, Bangkok, Thailand, that William WARD and Sylvia BAILEY had distributed twenty-five (25) ounces of high-grade Heroin through the mail system to the United States and possibly Germany. The Heroin was contained in two types of envelopes; (1) a white envelope with Thai stamps, "airmail" stamped in red, measuring 8½" by 4¼", and (2) a brown envelope with Thai stamps, "airmail" stamped in red, measuring 6¾" by 4¾". At least two of these envelopes were addressed to the CONTINENTAL PRINTING COMPANY, 1125 "D" Street, N.E., Washington, D. C. 20002 from the GETZ PAK PRINTING COMPANY, 91 Patpong, Bangkok, Thailand.

On Monday, February 4, 1974, information was received by the Washington District Office, Drug Enforcement Administration, that BAILEY and WARD were arrested in Room 1117 of the Rama Hyatt Motel, Bangkok, Thailand, in possession of a kilogram of heroin. At the time of their arrest, WARD and BAILEY were in the process of dividing a kilogram of Heroin into ounce envelopes for distribution to the United States via mail. Twenty-nine (29) envelopes were sealed and addressed to various addresses in the United States. The four (4) addresses below were among the 29, and are in the Washington, D. C. area:

TO: Miss D. Kelly
1622 Perry Street, N.E.
Washington, D. C. 20018

FROM: Wing Chu
71 Sub Road
Bangkok, Thailand

TO: Miss Mary Richardson
311 Rock Creek Church Rd., N.W.
Washington, D. C. 20011

FROM: S. Richardson
293-2 Suriwongse Road
Bangkok, Thailand

TO: Continental Printing Co.
1125 D Street, N.E.
Washington, D. C. 20002

FROM: Kim Lee Printing Co.
P. O. Box 127
Bangkok, Thailand

TO: Miss Shirley Hill
5109 Mann
Deanewood Park, Maryland 20027

FROM: K. Singh
13216 Gayson Road
Bangkok, Thailand

On February 5, 1974, information was received from the New York Regional Office, Drug Enforcement Administration, that the United States Customs had intercepted eight (8) envelopes containing a white powdery substance addressed to four Washington, D. C. addresses. Two envelopes were addressed to Miss D. KELLY, 1622 Perry Street, N.E., Washington, D.C. 20013. One of the two envelopes contained 21 grams of a white powdery substance, for a total of 49 grams. The return address was reflected as MALER SAE HENG, 66 Sukhumnit, Bangkok, Thailand. A field test was initiated by George Kallnischkies, Supervisory Customs Mail Specialist, and a positive reaction for an opiate substance was obtained. Two other envelopes were addressed to CONTINENTAL PRINTING COMPANY, 1125 "D" Street, N.E., Washington, D. C. 20002, from THE GETZ PAK PRINTING COMPANY, 91 Patpong, Bangkok, Thailand. Each of the envelopes contained a white powdery substance, and each envelope contained 21 grams of said substance for

a total of 42 grams. A field test by Customs Officer Kallnischkies produced a positive reaction for an opiate substance. Two more envelopes were addressed to Miss Mary RICHARDSON, 311 Rock Creek Church Road, N.W., Washington, D. C. 20011, from NEW STAR STUDIO, 345 Metraphan, Bangkok, Thailand. One envelope contained 21 grams of a white powdery substance, and the other envelope contained 14 grams of a white powdery substance, for a total of 35 grams. A field test by Customs Officer Kallnischkies produced a positive reaction for an opiate substance. The last two envelopes were addressed to Miss Shirley HILL, 5109 Mann Street, Deanewood Park, Maryland 20027, from KAMOL JEWELERY SHOP [illegible] Rama IV Road, Bangkok, Thailand. Each of the envelopes contained 21 grams of a white powdery substance, for a total of 42 grams. A field test by Customs Officer Kallnischkies produced a positive reaction for an opiate substance.

On February 5, 1974, the eight (8) envelopes containing the suspected Heroin were turned over to Special Agents David Thamann and Kenneth Keefe, New York Regional Office, Drug Enforcement Administration, by U.S. Customs Officer George Kallnischkies. On February 6, 1974, the envelopes were forwarded in a locked mail pouch to Postal Inspector Richard Hall, Merrifield, Virginia, under controlled conditions.

On February 12, 1974 the eight (8) envelopes were received by Inspector Richard Hall, U.S. Postal Service, Merrifield, Virginia. A search of the envelopes pursuant to a U.S. Magistrates Search Warrant on February 12, 1974 yielded a quantity of white powder in each envelope. A field test by the Affiant resulted in a positive reaction for the presence of an opiate. All of the white powder was seized from the eight (8) envelopes except for a small amount. Lactose was then substituted for the suspected heroin by the Affiant and the envelopes were resealed by the Affiant and Inspector Hall. The envelopes were retained in the custody of Inspector Hall for a future controlled delivery.

A laboratory analysis of the heroin contained in three (3) envelopes, addressed to Continental Printing Com-

pany, and 1125 "D" Street, N.E., Washington, D. C. 20002 which were previously seized on February 7, 1974, pursuant to a U.S. Magistrate's Search Warrant, yielded 92.5% Heroin Hydrochloride.

On February 4, 1974, an individual identifying himself as "Melvin Austin" obtained a cashier's check in the amount of $2,000.00 from the Riggs National Bank payable to Gilda BUCK, a documented associate of Sylvia BAILEY. On February 7, 1974, an individual identifying himself as "Melvin Johnson" obtained a cashier's check in the amount of $4,000.00 payable to Gilda BUCK from the same branch of Riggs National Bank. The individual purchasing the checks from Riggs on both occasions in February has been subsequently identified by Bank officials as James W. Kelley, MPD identification # 132 918.

A check of Sylvia BAILEY's telephone tolls at Aschaffenburg, Germany, by Drug Enforcement Administration Agents reveals a telephone call being made on 11/23/73 to Washington, D.C. telephone number (202) 635-0892. This telephone number is located at 13 S Street N.E., Apartment 2, Washington, D.C. This phone is listed to Inez Arrendell sister of Charles Ramsey. Further, an examination of telephone tolls with telephone number (202) 635-0892 reveals numerous telephone calls to Germany, and in particular, to the area code "6021" (Aschaffenburg, Germany area code). Upon conferring with the Metropolitan Police Department of Washington, D.C., it has been determined that 13 S Street, N.E., App. # 2, Washington, D.C., is occupied by Charles W. RAMSEY, and during December 1973, Officers of the Metropolitan Police Department have observed RAMSEY exiting these premises during the morning hours.

On 2/14/74, James W. KELLY was observed by the officers to meet with Charles RAMSEY, in the Unit Block of S Street, N.E. after having also having been observed the affiant and the DEA agent picking up the letters containing heroin at each of the addresses listed above (5109 Mann Street, Deanewood, Md.; 1125 D Street, N.E., Washington, D.C.; and 311 Rock Creek Church Road, N.W., Washington, D.C.). KELLY was

then observed by DEA agent [illegible] passing these letters to Charles W. RAMSEY who was in the 1972 Lincoln (921-405 D.C. Registration) parked approximately in the front of 13 S Street, N.E. RAMSEY was observed by DEA agents as he examined the package containing the letters, and incident to the arrest of both RAMSEY and KELLY, RAMSEY was observed by DEA Agents to hand the package back to KELLY.

A search of BAILEY incident to arrest produced a personal notebook with the notation "Hotel Hyatt Rama, Bangkok, Thailand." This is the hotel where Sylvia BAILEY was arrested in possession of one kilogram of Heroin. In addition, there is a notation in the notebook "BAILEY" number "# 6021-73133" and "# 6021-29156." Both these telephone numbers are located at Aschaffenburg, Germany, the hometown of Sylvia BAILEY. Additionally, a letter was found in RAMSEY's possession addressed to "Mr. Charles RAMSEY, 13 S Street, N.E., Washington, D.C., 20002."

It is the opinion of the Affiant that based upon his knowledge and experience over the past year and a half that the purity of the Heroin being mailed to RAMSEY would normally require diluting and packaging prior to "street distribution." It would be necessary to have a location house or room, where this packaging could be done. It is to be noted that when RAMSEY was observed within minutes of his arrest he was *approaching* the immediate vicinity of 13 S Street, N.E., and was *parking* the Mark IV which he was driving. Thus the affiant submits that it is reasonable to believe that RAMSEY was preparing to enter 13 S Street, N.E., Washington, D.C. (There is no evidence yet developed linking RAMSEY to any other house or apartment in the immediate vicinity of 13 S Street, N.E.) and in light of the several phone calls from the phone within apartment # 2 to the Aschaffenburg, Germany hometown of Sylvia BAILEY at least since December of 1973, that it is reasonable to believe that 13 S Street, has been continually and recently used as a cutting and packaging "pad" as well as a general business address for the perpetuation of an international network of illicit narcotic trafficking.

So too, it is the firm belief of the affiant that Charles W. RAMSEY was the ultimate Washington, D.C. recipient of the heroin mailed from Bangkok, Thailand, by Sylvia BAILEY. This fact is based upon: (1) telephone tolls from RAMSEY's home telephone at 13 S Street, N.E., Apartment # 2, Washington, D.C. to Aschaffenburg, Germany, the hometown of BAILEY; (2) the notations found on RAMSEY at the time of his arrest linking him to the hotel where BAILEY was arrested in possession of a kilogram of Heroin; and (3) and the observations of DEA Agents on 2/14/74 when RAMSEY took possession of the letters containing Heroin from KELLY.

In view of the facts stated above, and the additional fact that Charles RAMSEY is a known and convicted narcotic felon (as well as having been recently convicted of making false declaration before a Grand Jury), it is the firm belief of the affiant that there is now contained on the premises at 13 S Street, N.E., Apartment # 2, Washington, D.C., the controlled substance Heroin; paraphernalia used in the preparation of Heroin for retail distribution, other instruments, fruit and documents including records, logs, etc., related to the preparation and dispensation of Heroin and any other narcotic drug illegally held in violation of 21 U.S.C. 174 and 21 U.S.C. 841(a)(1).

/s/ Michael E. Grimes
MICHAEL E. GRIMES, Special Agent
Drug Enforcement Administration

Subscribed and sworn to before me this 15th day of February, 1974.

/s/
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on April 1, 1974

Criminal Case No. 74-623

UNITED STATES OF AMERICA

v.

CHARLES W. RAMSEY
JAMES W. KELLY
SYLVIA BAILEY
WILLIAM M. WARD

Grand Jury Original

Violation: 21 US Code 952(a); 843(b); 841(a) (Importation of a Controlled Substance; Unlawful Use of a Communicative Facility; Unlawful Possession With Intent to Distribute a Controlled Substance)

The Grand Jury charges:

FIRST COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY, JAMES W. KELLY, SLYVIA BAILEY and WILLIAM M. WARD did unlawfully, knowingly and intentionally import 166.5 grams of heroin, a Schedule I narcotic drug controlled substance and other substances, into the United States from a place outside thereof, in violation of Title 21, U.S. Code, Section 952(a).

SECOND COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY, JAMES W. KELLY, SYLVIA BAILEY, and WILLIAM M. WARD did unlawfully, knowingly and intentionally use a communication facility, that is, the United States mails in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) and as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment and relating specifically to the address of 1125 D Street, Northeast, Washington, D.C. and identified as lab exhibit # 6 and 6(s) in violation of 21 U.S. Code, Section 843(b).

THIRD COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY, JAMES W. KELLY, SYLVIA BAILEY, and WILLIAM M. WARD did unlawfully, knowingly and intentionally use a communication facility, that is, the United States mails in committing and in causing and facilitating the commission of acts constituti nga felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment and relating specifically to the address of 1125 D Street, Northeast, Washington, D.C. and identified as lab exhibit # 7 and 7(s) in violation of Title 21, U.S. Code, Section 843(b).

FOURTH COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY, JAMES W. KELLY, SYLVIA BAILEY, and WILLIAM M. WARD did unlawfully, knowingly and intentionally use a communication facility, that is, the United States mails in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21,

U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment and relating specifically to the address of 311 Rock Creek Church Road, Northwest, Washington, D.C. and identified as lab exhibit # 10 and 10(s) in violation of Title 21, U.S. Code, Section 843(b).

FIFTH COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY, JAMES W. KELLY, SYLVIA BAILEY, and WILLIAM M. WARD did unlawfully, knowingly and intentionally use a communication facility, that is, the United States mails in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment and relating specifically to the address of 311 Rock Creek Church Road, Northwest, Washington, D.C. and identified as lab exhibit # 11 and 11(s) in violation of Title 21, U.S. Code, Section 843(b).

SIXTH COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY, JAMES W. KELLY, SYLVIA BAILEY, and WILLIAM M. WARD did unlawfully, knowingly and intentionally use a communication facility, that is, the United States mails in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment and relating specifically to the address of 5109 Mann Street, Deanewood, Maryland and identified as lab exhibit # 12 and 12(s) in violation of Title 21, U.S. Code, Section 843(b).

SEVENTH COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY, JAMES W. KELLY, SYLVIA BAILEY, and WILLIAM M. WARD did unlawfully, knowingly and intentionally use a communication facility, that is, the United States mails in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment and relating specifically to the address of 5109 Mann Street, Deanewood, Maryland and identified as lab exhibit # 13 and 13(s) in violation of Title 21, U.S. Code, Section 843(b).

EIGHTH COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY, JAMES W. KELLY, SYLVIA BAILEY, and WILLIAM M. WARD did unlawfully, knowingly and intentionally use a communication facility, that is, the United States mails in committing and in causing and facilitating the commission of acts constituting a felony under Title 21, U.S. Code, Section 952(a) as set forth in Count 1 of this indictment and relating specifically to the address of 1622 Perry Street, Northeast, Washington, D.C. and identified as lab exhibit # 8 and 8(s) in violation of Title 21, U.S. Code, Section 843(b).

NINTH COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY, JAMES W. KELLY, SYLVIA BAILEY, and WILLIAM M. WARD did unlawfully, knowingly and intentionally use a communication facility, that is, the United States mails in committing and in causing and facilitating the commission of acts constituting a felony under Title 21, U.S. Code, Section 952(a) as set forth in Count 1 of this in-

dictment and relating specifically to the address of 1622 Perry Street, Northeast, Washington, D.C. and identified as lab exhibit # 9 and 9(s) in violation of Title 21, U.S. Code Section 843(b).

TENTH COUNT:

On or about November 23, 1973, within the District of Columbia, CHARLES W. RAMSEY and SYLVIA BAILEY did unlawfully, knowingly and intentionally use a communcation facility, that is, a telephone, in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21 U.S. Code, Section 841(a) as set forth in Count 17 of this indictment in violation of Title 21, U.S. Code, 843(b).

ELEVENTH COUNT:

On or about November 27, 1973, within the District of Columbia, CHARLES W. RAMSEY and SYLVIA BAILEY did unlawfully, knowingly and intentionally use a communication facility, that is, a telephone, in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment in violation of Title 21, U.S. Code, 843(b).

TWELFTH COUNT:

On or about December 7, 1973, within the District of Columbia, CHARLES W. RAMSEY and SYLVIA BAILEY did unlawfully, knowingly and intentionally use a communication facility, that is, a telephone, in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment in violation of Title 21, U.S. Code, 843(b).

THIRTEENTH COUNT:

On or about December 9, 1973, within the District of Columbia, CHARLES W. RAMSEY and SYLVIA BAILEY did unlawfully, knowingly and intentionally use a communication facility, that is, a telephone, in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment in violation of Title 21, U.S. Code, 843(b).

FOURTEENTH COUNT:

On or about December 10, 1973, within the District of Columbia, CHARLES W. RAMSEY and SYLVIA BAILEY did unlawfully, knowingly and intentionally use a communication facility, that is, a telephone, in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment in violation of Title 21, U.S. Code, 843(b).

FIFTEENTH COUNT:

On or about December 11, 1973, within the District of Columbia, CHARLES W. RAMSEY and SYLVIA BAILEY did unlawfully, knowingly and intentionally use a communication facility, that is, a telephone, in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment in violation of Title 21, U.S. Code, 843(b).

SIXTEENTH COUNT:

On or about December 13, 1973, within the District of Columbia, CHARLES W. RAMSEY and SYLVIA BAILEY did unlawfully, knowingly and intentionally use a communication facility, that is, a telephone, in committing and in causing and facilitating the commission of acts constituting a felony under both Title 21, U.S. Code, Section 952(a) as set forth in Count 1 and Title 21, U.S. Code, Section 841(a) as set forth in Count 17 of this indictment in violation of Title 21, U.S. Code, 843(b).

SEVENTEENTH COUNT:

On or about February 14, 1974, within the District of Columbia, CHARLES W. RAMSEY and JAMES W. KELLY did unlawfully, knowingly and intentionally possess, with intent to distribute, 231.67 grams of heroin and other substances, a Schedule I narcotic drug-controlled substance in violation of Title 21, U.S. Code, Section 841(a).

/s/ Dennis F. Earman

A TRUE BILL:

Foreman

/s/ Earl J. Silbert
Attorney of the United States in
and for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 74-517

UNITED STATES OF AMERICA

v.

CHARLES W. RAMSEY, ET AL.

MOTION TO SUPPRESS TANGIBLE EVIDENCE

I.

A short time prior to February 4, 1974, eight brown envelopes containing heroin were air-mailed first class to four Washington, D.C. addresses from Bangkok, Thailand by two persons, one of whom was an American citizen. After arriving in this country—the exact point and time of entry is presently unknown to us—U.S. Customs agents seized all eight pieces of mail in New York City, opened the envelopes, field tested the contents thereof, and then resealed them—all without a search warrant. After conducting this warrantless search and seizure the envelopes were turned over to Drug Enforcement Agents (D.E.A.) on February 5, 1974. On February 6, 1974, they were forwarded to the Merrifield, Virginia post office facility under controlled conditions. On February 12, 1974, D.E.A. agents obtained a search warrant for these eight envelopes then located at the Merrifield postal facility, (Exhibit A). The envelopes were seized the same day and refilled for a controlled delivery to the Washington addresses where they were allegedly picked up by defendant James W. Kelly.

It is our contention that the original warrantless search and seizure of the eight envelopes violated the Fourth Amendment standard of reasonableness.

Since 1877, at least, mail of the instant type has been subject to Fourth Amendment protections.

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation . . .". *Ex parte Jackson*, 96 U.S. 727, 733 (1877)

Furthermore, regardless of the quantum of probable cause, a search per se not incident to an arrest is absolutely bad. *Taylor* v. *United States*, 286 U.S. 1 (1932). In *Taylor, supra.*, prohibition agents had received complaints about a particular premises for about a year. Upon going there they smelled whiskey from within the garage and a flashlight confirmed the presence of many cardboard cases inside. The agents entered and seized 122 cases of whiskey. Held: invalid.

> "Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant.", 28 U.S. at 6.

In the case at bar there were no exigent circumstances present to allow for dispensing with a warrant; the eight envelopes were in the custody and control of the postal service and the Supreme Court over four years ago, allowed a 29 hour detention of first class mail during which time a search warrant could be procured for a seizure. *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970).

The only theory we perceive available to the government to support the initial warrantless seizures herein, is the so-called Border Search. Under that concept, all persons entering this country are subject to search and seizure "without probable cause on the basis of mere suspicion alone." *United States* v. *Henriquez*, 483 F.d. 65 (5th Cir. 1973). That definition, however, may be too broad as we read the landmark case of *Carroll* v. *United States*, 267 U.S. 132 (1925). *Carroll* sustained the probable cause search of a car without a warrant under the National Prohibition Act, because of reasonableness. In reflecting upon such searches the Court alluded, inter alia, to the progenitor of 19 U.S.C., Sec. 482 which:

> "[M]ade lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect their was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law. . .". *Carroll*, supra at 151. The Court alluded to this statute and similar ones—
>
> "To show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." at 153.

The Court also noted that all travellers may be stopped while crossing international boundaries because of national self protection, "[b]ut those lawfully within the country, entitled to use the public highways, have a right of free passage without interruption of search unless" there is probable cause to believe they are in violation of the law.

The present Border Search authorizing statute is 19 U.S.C., § 482. It provides for searches of any "vehicle, beast, or person, on which or whom he or they shall suspect there is merchandize which is subject to duty, or shall have been introduced into the United States in any manner contrary to law." It also provides for customs agents "to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law."

It is interesting to note that the original Border Search statute considered in *Carroll* v. *United States, supra., i.e.*, 3 Stat. 231, 232, March 3, 1815, distinguished between an ambulatory and permanent situation.

> "And if any of the said officers of the customs shall suspect that any goods, wares, or merchandise, which are subject to duty, or shall have been introduced to law, are concealed in any particular dwelling, store or other building, he shall, upon proper application, on oath, to any judge or justice of the peace, be entitled to a warrant . . . Provided always, that the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, *or to packages on any animal or animals or carried by man on foot.*"

It was this original statute the Court alluded to in *Carroll, supra.*, when it observed that neither this section "nor any of its earlier counterparts has ever been attacked as unconstitutional." 267 U.S. at 152. 13 Stat. 441, 442, February 28, 1865, which again allowed for the so-called Border Search, provided for the stopping and searching of persons or vehicles in transit.

For non-moving situations the statute provided:

> "That in case any store, warehouse, or other building shall be upon or near the boundary line between the United States and any foreign country, and there

> is reason to believe that [items are placed there in violation of law], and the collector . . . or surveyor of customs, shall make oath before any magistrate . . ., that he has reason to believe, and does believe, that such offence has been therein committed, such officer shall have the right to search such building . . ."

14 Stat. 177, 178 July 18, 1866, for the first time specifically allowed customs officers to search any "trunk or envelope". But it is clear from a reading thereof, that such searches without warrant only applied to trunks or envelopes aboard vessels, vehicles, beasts or persons. The present statute 19 U.S.C., § 482 is but an abbreviated form of its predecessors, and from a historical perspective, does not permit for the opening of mail when there is no danger of that mail moving before a warrant can be obtained.

Time and time again the key to the validity *vel non* of a particular search is "reasonableness", vis-a-vis the fact that the warrant procedure is the judicially preferred route.

In *United States* v. *Beckly*, 335 F.2d 86 (6th Circuit 1964) marihuana arrived into this country in a package weighing between 9 and 10 pounds. It was stated to contain wall matts, pillow cases and robes of a total value of $23.00. A customs agent opened the package without warrant and the Court sustained introduction of the evidence at trial. As its first ground the Court relied on the fact that only first class mail is subject to the warrant procedure and here "first class postage was not paid on the package." 335 F.2d at 88. The Court also fashioned a policy that:

> "Fourth Amendment standards applicable to mail matter moving entirely within the country are not applicable to mail matter coming in from outside the country at least where a customs determination must be made. There seem to be no adjudicated cases dealing with the necessity of probable cause and search warrants for inspection by mail, but there are many cases holding or indicating that such is not required generally for searches by customs agents at the borders of the country."

This decision used a shotgun border search approach and extrapolated it to non-moving situations, without analyzing the difference between a true border search and mail matter already within the control of the postal authorities and for which time to obtain a warrant is present. The upshot of this judgment is that narcotics may be mailed first class within the United States and only seized upon probable cause resulting in a warrant while the same mail entering from, let us say, Canada, can be seized without probable cause and without a warrant. Thus, every piece of first class mail entering this country, the government must contend is subject to being opened for any reason and inspected. This would include medical reports, financial reports, letters to loved ones and the like—an awesome governmental power. *United States* v. *Sohnen*, 298 F. Supp. 51 (S.P.N.Y. 1969) also sustained a search of international mail without a warrant relying on the *Beckly*, rationale. However, the Court in Sohnen added a caveat:

> "The Constitution at least prevents harsh and demeaning searches on mere suspicion and it may well prevent the opening of letters, as opposed to packages containing merchandise, without a search warrant."

Sohnen, concerned a sealed package containing twelve gold coins which

> "did not bear a required label stating that it could be opened for customs inspection.
>
> * * * *
>
> The situation here is analogous to the inspection of inbound commercial shipments."

United States v. *Swede*, 326 F. Supp. 533 (S.D.N.Y. 1971), also upheld the opening of first class mail from Switzerland without a search warrant. In ruling, however, the Court determined that the envelope was a "package" and thus, "we do not determine whether the

Constitution prevents the opening of letters, as opposed to packages containing merchandise without a search warrant."

Recently, federal courts have obviously been aware of the havoc that a blanket border search approach to first class international mail would entail, and have accordingly, been narrowing their decisions to exclude letters, as the Court did in *United States* v. *Swede*, *supra*. In *United States* v. *Doe*, 472 F.2d 982 (2d Cir. 1973), for example, the Court upheld the search of a large package from Columbia South America labelled "old clothing."

> "While this court has never expressly so held, there is a substantial body of precedent that would apply the same border-search standards to mail coming into the country, *especially where, as here, there is a representation on the package that it contains merchandise.*" 472 F.2d at 984.

In *Corngold* v. *United States*, 367 F.2d I (9th Cir. 1966) the Court invalidated the search of a domestic first class parcel containing smuggled watches without a warrant. The government, in part, relied on 19 U.S.C. § 482. The Court noted that this was not a border search and, in any event, concluded that:

> "We need not examine the statute's precise meaning, for appellant's attack upon the search of his package is based solely on constitutional grounds and, however it is to be read, the statute could not effectively authorize a search which the constitution prohibited." 367 F.2d at 3.

Cf. *Ex Parte Jackson*, 96 U.S. 727, 733 (1877).

> "No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

> "It can hardly be contended that the sender or the addressee had a reasonable expectation of privacy with regard to a large package mailed from a foreign country, which is represented to contain nondutiable merchandise. Cf. *Katz* v. *United States*, 389 U.S. 347. . .".

Conversely, as to letter type envelopes, such expectation of privacy would be reasonable and accordingly, subject to the Fourth Amendment on the rationale of *Katz*.

In *United States* v. *Various Articles of Obscene Mer.*, 363 F. Supp. 165 (S.D.N.Y. 1973), the Court noted that "the constraints placed on government intrusion into persons and their papers by the Fourth Amendment do apply to Customs searches." at 167. Judge Duffy also observed that: "Some courts have hinted that the standards may be different when dealing with a letter-sized envelope than when it is a package with merchandise which is at issue."

This distinction between letters and packages is, no doubt, due in large part to subjective appraisals of privacy. While all of us have a general notion that large packages can be inspected by postal employees, we strongly believe that our letters and small sealed envelope type of correspondence is beyond postal scrutiny. We abhor notions of censorship such as that practiced in totalitarian countries or prisons. *Stroud* v. *United States*, 251 U.S. 15, 21 (1919). (No expectation of privacy for letters mailed by inmate at Leavenworth penitentiary.) Accordingly, there is a firmly grounded reasonable expectation that this envelope type of mail is secure from intrusion. As a result thereof, only the warrant procedure of the Fourth Amendment could effect a lawful seizure. *Katz* v. *United States*, 389 U.S. 347 (1967). Appellate support for this view is found in *United States* v. *Doe*, *supra*, at 985.

Furthermore, the recent cases of *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) and *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970) have greatly slowed down, we submit, border search powers. In *Almeida-Sanchez*, petitioner was stopped by a border patrol in the United States some 25 air miles from the Mexican

border and marihuana was found. The Court reversed the conviction. over four dissents. In considering the border search concept the Court stated:

> "Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may, in certain circumstances, take place not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point making the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.
>
> * * * *
>
> It is not enough to argue as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."

Following *Almeida-Sanchez*, the Court in *United States* v. *Speed*, 489 F.2d 478 (Fifth Cir. 1973) observed:

> "*Almeida-Sanchez*, if it has not answered all the questions about this area of the law, has at least given new focus to the inquiries. We must now ask if a search occurred either at the border or at the functional equivalent thereof. If not, then it is not a border search.
>
> * * * *
>
> In other words, the searching officers must know or have a reasonable suspicion that the very individual or thing to be searched has itself *just crossed the border*." (Emphasis supplied).

In *United States* v. *Hamilton*, 490 F.2d 598 (9th Cir. 1974),

> "At about 4:30 p.m. on the day in question one Fernan, a Border Patrol agent was informed by a previously demonstrated reliable informant that a truck, which he pointed out to him parked across the street from the Customs Agency in Calexico, California, had marihuana concealed in a false compartment in the body bed."

The truck had previously entered from Mexico at 2:30 p.m. When another agent looked out the window it was gone and a general call was sent out. At about 6:30 p.m. government agents recognized the truck and searched it. The Court held that this was not the functional equivalent of a border search. "We merely note, in passing, that this is not a case of a short hiatus after suspicion has been aroused."

In *United States* v. *Van Leeuwen*, *supra.*, respondent was convicted of illegally importing gold coins from Canada. He mailed two 12-pound packages at the post office in Mt. Vernon, Washington a town 60 miles from the Canadian border. One package was addressed to California and the other one to Tennessee. Respondent's car bore British Columbia license plates. "Other evidence showed that respondent had brought the two packages in from Canada without declaring them." Interestingly, a *customs agent* thereafter obtained a search warrant for the packages without first inspecting them. The Court held that the 29 hour delay in obtaining the warrant was reasonable under the investigative circumstances present. The Court applied Fourth Amendment requirements for an inspection of the packages even though they had been taken across the Canadian border. The Court did not seek to justify the seizure under border search concepts.

> "The nature and weight of the packages, the fictitious return address, and the British Columbia license plates of respondent who made the mailings in this border town certainly justified detention without a warrant while an investigation was made."
>
> * * * *

> "The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained."

The case can be read to indicate that once an individual or his packages are within the confines of our borders for any appreciable time (here 60 miles, an hour and one-half drive) a border search or functional equivalent thereof is not permissible. In balancing the interests, however, the Court allowed for a lengthy detention without search of the packages to enable a proper warrant to be obtained.

The instant initial search, as we understand the law, is, therefore, invalid for two reasons.

1. The Fourth Amendment protects all letter type first class mail from searches without warrants whether mailed internally or externally. The so-called border search concept was an offshoot of the necessity to act quickly when the individual and his vehicle at a border would soon be gone. No such justification exists herein, where the mail was in the custody and control of the postal authorities and the agents had ample time to apply for a search warrant.

2. Regardless of initial application of the border search concept to these letters, once they were in the custody and control of the postal authorities for any appreciable period at the initial point of entry, the full force and effect of the Fourth Amendment came into play and a search warrant was required before any inspection could occur.

In addition to the recent cases just cited for this proposition, *Carroll* v. *United States*, 267 U.S. 132, 154 (1925) long ago indicated that result.

> "Travellers may be so stopped in crossing an international boundary because of national self protection requiring one entering the country to identify himself as entitled to come in, and his belongings and effects which may lawfully brought in. But those lawfully within the country, (first class mail), entitled to use the public highways, have a right to

> free passage without interruption or search unless there is known to a competent official authorized to search, probable cause. . .".

Apparently, the agents herein were advised of the constitutional error in opening the envelopes initially, and attempted to cover up that transgression by obtaining a search warrant for them on February 12, 1974; that, however, was too late.

Accordingly, we seek to suppress the envelopes, their contents, and all evidence subsequently tainted by the initial unlawful search and seizure. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920).

Wherefore, it is respectfully submitted that the instant motion be granted.

Respectfully submitted,

/s/ Allan M. Palmer
ALLAN M. PALMER
1707 N. Street, N.W.
Washington, D. C. 20036
785-3900

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was personally served on the Office of the U.S. Attorney this 4 day of October, 1974.

/s/ Allan M. Palmer
ALLAN M. PALMER

[3] MOTION TO SUPPRESS TRANSCRIPT PROCEEDINGS

MR. REARDON: The government will call George Kallnischkies.

He will spell his name for the court reporter.

GEORGE KALLNISCHKIES

called to the witness stand on behalf of the government, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REARDON:

Q Sir, will you please give the Court your full name and please spell it slowly for the court reporter?

A George Kallnischkies. K-A-L-L-N-I-S-C-H-K-I-E-S.

Q And how are you employed, sir?

A I am employed by the U.S. Customs Service, Region 2, New York City.

Q How long have you been employed in that capacity.

A June 20, 1964.

Q Would you please recount for the Court your responsibilities in that regard?

A My main responsibility is to examine incoming foreign mail, letter class mail, to see if it contains any dutiable merchandise, contraband or narcotics, and other prohibited matters.

Q How long have you specifically been performing that [4] task?

A About eight or nine years.

Q Are you in a supervisory position?

A Yes, sir.

Q How many people work under you, sir?

A I have nine people working at the General Post Office and I have nine people working at the Kennedy Airport.

Q And what class mail do you handle?

A As I said before, we work strictly on letter class mail. Packages go to a different customs section that will examine large packages.

Q What is letter class mail?

A Well, letter class mail includes envelopes matter, newspapers and book packages and so on.

Q Are your inspections restricted to those items coming from without the country?

A Yes, from abroad.

Q Do you also inspect domestic mail?

A No, sir.

Q Could you explain whether in fact there exists first class mail coming to this country from another country?

A No, sir, it is considered letter class mail, sealed mail, but it is not first class mail.

First class mail is only domestic mail, sir.

[5] Q In the course of your inspections of letter class mail coming into this country from without, could you explain to the Court and Counsel what is the ordinary procedures which you will undertake for this task?

A First of all, mail will—we are talking here about airmail in particular and it will come into Kennedy Airport and from there it will be routed to the various post offices and in this particular case to the General Post Office.

The airmail sacks still intact will go into the Registry Division and they will remove registered mail from it, valuable mail, and other mail from certain designated countries that U.S. Customs would like to examine will be routed to me.

Q Do you also inspect registered mail coming into the U.S.?

A Yes, we do.

Q Is that given a different classification than letter class mail?

A It would still be letter class mail. The only thing is that it is considered registered and it is accountable.

Q What does that mean? Would you explain that?

A There is a record kept from the time it is seized until the time it is delivered and the recipient signs for it.

Q Directing your attention to the date of February 4 [6] of this year, do you recall whether you were working on that date?

A Yes, sir, I was.

Q Where were you working specifically?

A Working in the General Post Office in New York City.

Q Did you have occasion to inspect any letter class mail coming into the United States on that day?

A Yes, sir, I did.

Q Could you explain what your procedures were that particular day?

A The procedures were the same as every day. Mail comes in and—a foreign airmail sack and mail gets dumped on a conveyor belt and there the mail is being separated, processed by a postal employee and they will tray-out letter class mail letters in trays and they will separate newspapers and they will separate little packages, they separate special delivery mail and that will be given special handling and while they are doing it or sometimes I am doing it or there present, we will separate any mail that looks to us suspicious or believe it to contain merchandise for further examination.

Q Did you do so in this case?

A Yes, sir, I did.

Q As a result of that inspection, what, if anything, [7] did you find?

A Well, I think I will have to be specific about what we are talking about here, sir, because I find a lot of stuff.

Q Let me rephrase that for you: Did you in fact intercept any letters on the particular day that I gave you?

A Yes, sir.

Q Did you intercept any letters on that particular date which were destined for the Washington area?

A Yes, sir.

Q How many of these? Do you have your report with you?

A Well, I have a report here. We are talking about 8 envelopes that we are talking about right now, but I may have had more. I really don't know, sir.

Q All right.

With regard to those 8 envelopes, how did you—how did they come to your attention?

A Well, I was on the belt and these envelopes were rather—from Bangkok, Thailand and they were rather bulky and I believed them to contain merchandise and what do I mean by merchandise?

Anything would be—anything that would be not paper, correspondence, but could be possible narcotics or other merchandise.

[8] Q What kind of postage did those letters have on them?

A They had, as far as I can recall, Thailaneze postage stamps.

Q Did you—do you inspect mail from all countries, sir?

A No, certain countries.

Q Is Thailand one of those countries?

A Yes, sir.

Q In fact, did you have occasion to seize letters from Thailand during this year, sir?

A Yes, I would say yes.

Q On how many occasions roughly?

A Well, prior to February 4, I can't really tell you how many we had, but as of now—as of the last day of September, we had 48-envelopes containing heroin from Thailand.

Q In regard to the eight envelopes addressed to the Washington area, what did you do?

A I took them to a specific area that I have for examining the mail. I felt the envelopes and later on I weighed one of the envelopes and it was like 42 grams which is rather heavy for an airmail envelope.

Q Excuse me. How much is—how much does any ordinary airmail envelope weigh?

A Well, an ordinary airmail envelope would weigh about [9] 7 grams or a quarter of an ounce, or let's say 14 grams, a half ounce, but 42 grams which is an ounce and a half is rather heavy.

Q I see.

A It also felt like there was something in there, in the envelope. It was not just plain paper that the envelope is supposed to contain.

Then I took one of the envelopes and opened it. In there I saw some cardboard and between the cardboard, if I recall, there was a plastic bag containing a white powdered substance, which, based on experience, I knew from Thailand would be heroin.

I went ahead and removed a sample. Gave it a field test, a Marquis Reagent field test, and I had a positive reaction for heroin.

Q Does your record reflect which envelope you opened first?

A No, sir, it does not.

Q What did you do with regard to the remaining seven envelopes?

A Well, the envelopes in a lot of ways were identical. Some of them had the same return address. They were all typewritten and they came from the same area and I proceeded to open the others.

Q Did you—could you explain for us whether in fact these letters are considered to be first class mail?

[10] A No, sir, they are not.

Q Could you explain why?

A Because foreign mail from abroad is classified as letter class mail and not first class mail.

Q All right.

A We have a regulation to that effect.

Q MR. REARDON: Your Honor, may I please have this exhibit marked as government exhibit No. 1?

(Government exhibit No. 1 was marked for identification.)

BY MR. REARDON:

Q I show you now what is marked as government 1 for identification. Do you know what that exhibit is?

A That is a part of the Code of Federal Regulations, Chapter I, Title 19 of the Code of Federal Regulations and Part 145.2 entitled "Mail Importations".

Q Are you familiar with that?

A Yes, sir, I am.

Q How do they affect your job?

A Well, it says here, "all mail originating outside the customs territory of the United States, whether sealed or unsealed, is subject to customs examination" and so on.

Do you want me to read all of that?

MR. REARDON: May I have the Court's indulgence?

THE COURT: Yes.

[11] MR. REARDON: Your Honor, the government has no further questions at this time.

CROSS-EXAMINATION

BY MR. PALMER:

Q Now, the particular envelopes that you opened, I take it you did not have a search warrant to open those envelopes, is that correct?

A Yes, sir, because I didn't need a search warrant because the regulations specify that we can.

Q In other words, there was no search warrant to open this mail?

A No search warrant issued.

Q Is that the customary procedure in New York City?

A We do it nation-wide, sir.

Q In other words, nation-wide, any mail could be gone into that goes into the post office that comes from without the country?

A Yes, sir.

Q That is always the same procedure? No search warrant is necessary?

A No search warrant is necessary.

Q Were you familiar, sir, that here in Washington, D.C., in Washington, three envelopes directed to this same address was seized pursuant to a search warrant without postal inspectors first going into them?

[12] MR. REARDON: I object to that, Your Honor. Counsel has—

THE COURT: The objection is overruled. He may proceed.

BY MR. PALMER:

Q In other words, sir, did you know that in this jurisdiction, Washington, a search warrant was obtained for the envelopes before any intrusion was entered into the letters?

MR. REARDON: I object to that, Your Honor, on the grounds of relevancy.

THE COURT: Your objection is noted for the record, and overruled.

BY MR. PALMER:

Q Did you know that, sir?

A No, sir, because if I may say, it is my job in New York City to intercept any mail that I believe to contain merchandise. I don't know what is going on in Washington or any place.

After I intercept it, I just turn it over to the Drug Enforcement Administration. I am not in an investigative capacity at all.

Q Thank you.

MR. PALMER: Would you mark this defendant's [13] exhibit 1, this affidavit dated February 7, 1974, which was given to me earlier by the government which is an affidavit in fact for three similar letters in this jurisdiction, which were obtained pursuant to search warrant prior to any nonwarranted intrusion.

THE COURT: For what purpose is it offered?

MR. PALMER: To show what the government thought proper in the Washington jurisdiction as to the necessity for a search warrant.

THE COURT: It will be marked as part of the record.

(Defendant's Exhibit No. 1 marked for identification)

MR. REARDON: I will object for the record, Your Honor.

THE COURT: Your objection is noted.

BY MR. PALMER:

Q These particular 8 envelopes and by the way. do you have a picture of them?

A I took some Zerox copies of the outside of the envelopes, yes.

Q Do you have those with you?

A Yes, sir.

Q May I see them?

A Yes. As a matter of fact, I have all the records pertaining to what we are talking here about.

[14] MR. PALMER: Does counsel for the government have an additional copy?

MR. REARDON: Yes, I have a copy. I can give counsel a copy. I don't have an additional copy for the Court at this time. I could pass mine up. I will pass this up so the Court may follow the testimony.

BY MR. PALMER:

Q Do you have copies here of each of the eight letters?

A Yes, I do.

MR. PALMER: Would Your Honor indulge me a moment? I have not seen this before.

THE COURT: Yes.

MR. REARDON: Might I note for the record that the Customs officer brought that to the office when he came down here from New York.

MR. PALMER: Does Your Honor have a complete set?

THE COURT: I don't know if it is complete, but it is a set supplied to me by the government.

MR. REARDON: That is the set that was given to me.

THE COURT: It appears to be a 20-page document.

MR. PALMER: This is defendant's exhibit No. 2.

(Defendant's exhibit No. 2 marked for identification)

[15] BY MR. PALMER:

Q Now, these 8 envelopes, were they taken by you all at the same time off of the conveyor belt, so-to-speak?

A More or less. The times are indicated on the upper righthand corner at what time I processed these envelopes and they were assigned seizure numbers.

Q Would these notes help you in your recollection?

A Yes, sir, these are my only records, sir.

Q Now, sir, when were these envelopes mailed in Thailand?

A That I don't know. I don't pay any attention to that.

Q Is there any way you can determine that from looking?

A Perhaps I could. I don't know. It is hard to make out now. There is a postage cancellation stamp. It is 30.0.17 on one of them.

Q Excuse me.

A 30.1.17 which would be the 30th of January and 17 would probably be the time of the day. The same thing on here.

If I may say so, judging, you know, on this—

Q Based on your experience.

A Based on my experience, they were intercepted on [16] February 4 and it was naturally mailed sometime in January, but one of the stamps indicates the 30th of January. That would be about the right time.

Q Now, are these letter type envelopes, were they airmail?

A Yes, sir.

Q They carried the right postage?

A That I don't know. I am a Customs official and not a post office official. I don't pay attention to what they —what the postage is.

Q Does it indicate that they do not carry the right postage?

A Not as far as I know.

Q Now, where did these envelopes first arrive in this country?

A Well, I wasn't there when they arrived. I assume that it was at Kennedy Airport.

Q And when did they arrive?

A That I do not know either.

Q Who would know exactly when these envelopes actually reached our territory?

A Well, I guess if somebody wanted to trace the receipt of mail, it would be the Postal Inspection Service, but since these letters were not registered, ordinary airmail, [17] there is no record being kept. Nobody could be specific as to when they entered the country.

Q Now, after arriving at JFK, how do they come into the country?

A I actually do not get involved in this, this procedure, but I have an idea as to how it does arrive. Are you interested in that?

Q Yes.

A All right. It would come on an airplane and it would get unloaded on to a post office truck and routed into the post office building at the Kennedy Airport. There they would make a distribution and if an airmail sack is addressed to New York, New York, it would remain in New York to be worked.

If it says Chicago, Illinois, it would be rerouted in another airplane and leave.

Q Now, the mail, for example, these eight pieces, when they arrive at their first point which is probably JFK, Kennedy Airport, that is also New York City, is that correct, sir?

A Yes.

Q And at that point, there are Customs agent there also?

A No, there are not. You see mail is—goes first into the post office. The post office will refer the mail to the [18] U.S. Customs Service for examination.

Q So at the first point of entry, there are no Customs personnel to examine the mail?

A No, sir.

Q Now, from there, JFK, for example, these letters would go where next?

A Well, some of the mail will be worked at Kennedy and some of the mail will be worked at the General Post Office depending how the airmail sack is labeled.

Like if it says New York City, it will come into New York City. It will be worked at the General Post Office. If it just indicates New York, New York, it will remain there and will be worked off there.

Q Now, these particular eight envelopes, where did they go from JFK?

A Well, that sack went into the General Post Office.

Q And do you know when that sack arrived at the General Post Office?

A No, sir, I don't know that.

Q Do you have any idea normally how long it takes to go from JFK to the General Post Office?

A I would say if it arrives in the morning, it probably would arrive there at the General Post Office the same day, sometime in the afternoon. I really don't know. It depends on a lot of things.

[19] It depends on traffic, weather, whether it is raining or not and what the backup is. What the backup of mail is.

Q All right.

Now, do you know as a fact that these eight pieces first arrived in the California area and then rerouted to New York. Do you know that?

A No chance. They would have been worked over there.

Q They would have been worked in that area?

A Right.

Q Now, did—

MR. REARDON: I am sorry. I did not hear the answer.

(The answer was read)

BY MR. PALMER:

Q Now, when these eight letters arrived, I take it you were stationed at the—

A At the General Post Office.

Q Is that in Manhattan?

A Yes, sir.

Q Foley Square?

A No, Manhattan across from the Penn Station, Madison Square Gardens.

Q All right.

[20] And what happened to this mail when it arrived there?

A Well, as I said before, the mail came into the building and probably went into the Registery Section, and the seal on the sack was broken and the registered mail was removed because they have to count the pieces that are registered and then the remaining mail was sent to my section for examination, the ordinary mail.

I received the sack, dumped the sack out and processed the mail and we discovered these envelopes.

Q Now, prior to you discovering each of these envelopes you had no knowledge of these envelopes in relation to Thailand or Germany or anything like that, did you?

A I—

Q You had no prior information about this case, did you?

A No, sir.

Q This was the first time that this came to your attention, these envelopes?

A Yes, sir.

Q You had seen—to your recollection, these addresses mailed to this country, you had not noticed them before?

A Nothing.

Q This was sort of a first time spot check as to these eight envelopes?

[21] A Well, if I may correct you, it is not a spot check. It is a normal procedure that we have. We will work certain countries and we will really scrutinize them.

Q All right. We will get to that.

In any event, to get to my original point, insofar as these eight envelopes are concerned, you had no prior information at all concerning these eight envelopes?

A Right.

Q Now, I believe you indicated that there were certain countries that you are associated with or concerned with, is that correct?

A Yes, sir.

Q I assume Thailand is one of them?

A Yes, sir.

Q And other Southeast Asia areas?

A Yes, sir. South America and Columbia, for instance, you know.

As I indicated before, we work the mails for various reasons. We have matter, pornography, for instance, which is prohibited by law and we enforce postal laws which prohibit the imporation of lottery mail, Irish Sweepstakes and so on.

We receive counterfeit money from Columbia which is also prohibited. Cocaine from there which is prohibited.

[22] We receive heroin from Thailand based on our experience.

Q Now, was it the entire sack of mail that was delivered to you?

A Yes, sir.

Q And the entire sack of mail was—

A Yes, we worked it off our distribution. It gets worked off and it goes—gets trayed out and goes to a section where postal employees will box up the mail and it gets delivered.

Q Was all this mail from Thailand?

A Yes, that was all mail from one particular country, from Thailand, in that sack, yes, but we were working other countries too.

Q I understand that. But this particular sack was mail from Thailand?

A Yes, sir.

Q All right.

Q And approximately how many pieces of mail were within that sack?

A I don't have the slightest idea, sir. I don't pay any attention to that.

Q Do you know, for example, whether—

A Well, for one thing, Thailand is not a big country. [23] Therefore, there was not that much mail from that country.

Q In other words, could these have been the only eight envelopes—

A No, sir, we had definitely more. Maybe we had 200 or 500 envelopes from that particular country.

Q Now, the normal procedure I believe you indicated was to do what?

A Thailand or any other mail we examine, we dump it out and on the conveyor belt and the mail is just loose and you have newspapers, books and you have small packages that are dutiable and so on and we have these different separations and while doing so, if there is anything that is not a package—a package will go to a certain Customs section for examination as to contents, but letters normally gets processed but if you feel a letter may also contain merchandise, we will put it aside, for example.

Q Now, the particular letters we have here that are marked as an exhibit, this is considered letter mail? Is that correct?

A Yes.

Q Airmail letter class mail?

A Yes, sir.

Q And such mail of this particular type if it were mailed within this country, is that the same equivalent as first class mail?

[24] A To my understanding, yes, sir, in the United States it is considered first class mail.

Q All right.

As far as you know, this particular eight envelopes, to your knowledge, carried correct airmail postage? Any signs of postage due or anything?

THE COURT: He said he doesn't know. He has already answered that.

THE WITNESS: You know, I don't collect the postage. I am there to examine the mail.

BY MR. PALMER:

Q Now, on the face of each one of these envelopes, did there appear to be so-called letter mail, as you looked at the envelope?

A Yes, sir, these are letters. They are various sizes like six and three-quarter inches by five and we have eight and a half by four and a quarter inches.

Those are the various sizes that we have.

Q Now, you indicated that you took one of them and opened up the envelope?

A Well, first of all, I examined the envelope from the outside because, you know, there is so much mail coming through that I just don't open mail without having a good reason to open it.

[25] I felt the envelope and it was rather bulky. I felt it by feeling it and I said to myself there is something else in there besides just plain paper, which is correspondence. Then I proceeded to open the envelope, yes, sir.

Q After having opened the first one, having done that, you went and examined and opened the other seven also?

A Well, they were identical. They looked as if they came—this is just my impression, but they looked like they came from the same place and so they did have a different return address.

One was New Star Studio and the other one had Corngold Jewelry Shop but they all looked like they came from the same typewriter.

MR. PALMER: Will Your Honor indulge me for one moment?

THE COURT: Certainly.

We will take a five-minute recess.

MR. PALMER: Thank you.

(Whereupon, a short recess was taken.)

BY MR. PALMER:

Q Now, sir, other than the fact that it is not your normal procedure to do so, as you have indicated, were there any rules or regulations to prevent, if you so desired, to prevent you from keeping these envelopes in your custody during [26] the time in which a warrant could have been obtained to open them up?

A I don't—

MR. REARDON: Your Honor, I don't think I understand that question.

THE COURT: Rephrase the question.

BY MR. PALMER:

Q Did you—

THE COURT: He has told you that it was not necessary. He has answered that question.

MR. PALMER: I understand that, Your Honor. I am getting to something.

THE COURT: All right.

BY MR. PALMER:

Q You indicated that normally your procedure, the Customs procedure, is not to obtain warrants, but to go into the mail coming into the country?

A Right.

Q Was there any rule or regulation whatever to prevent you from keeping this mail in your custody while a warrant could be obtained for it?

MR. REARDON: I will object to that question.

THE COURT: That is speculative and hypothetical. He has testified that that is not required.

[27] The objection is sustained.

BY MR. PALMER:

Q Now, after this sack of mail from Thailand was dumped and sorted out, you indicated that you opened first, after looking at it, one of these eight envelopes, is that right?

A Yes, I had to open one first.

Q At the time when you opened the first envelope, were you aware of the other seven?

A Yes, well, we had already culled out the envelopes that all appeared bulky and so we had—took them all aside and then I had to open one of them.

You were asking me before which one was opened first. I can give you that answer now. I have the time stamp when different envelopes were processed so, you know, I can give you that.

Q When was the first one opened?

A One was opened at 1:30. Well, I guess the one to Miss Shirley Hill was opened first. It was opened at 1:30 p.m.

Q One-thirty p.m.?

A Yes.

Q And that mail would have arrived at the post office about what time, sir?

A Sir, that mail would have arrived on Saturday—could have arrived on Saturday or Sunday because Monday was— [28] well, there is a shortage of work force on the weekend and mail just gets held.

Q The day it was opened, I take it, was February 4?

A February 4 was a Monday.

Q And this particular mail could have been there as long as from Saturday, is that correct?

A It could have, but not very likely because mail doesn't lay around that long. If it came in Sunday—as I said, it could have been Saturday.

Q Or it could have been Sunday?

A Right.

Q Or it could have been Monday morning?

A Monday morning from Kennedy Airport to arrive at the General Post Office would be too fast, not at 1:30. It was not Monday's mail. It must have been Sunday's.

Q This mail then arrived at the General Post Office at the latest on Sunday, is that right?

A At the latest, yes.

Q At the earliest on perhaps Saturday?

A Right.

Q Not on Monday?

A No, not on Monday.

Q Fine. Thank you.

Now, do you have Customs people working there on Saturday and Sunday?

[29] A Not in the particular operation that I have, the letter class examination of mail. We work Monday through Friday.

Q The other two days, Saturday and Sunday are the days off?

A The mail will be held aside, you know, and we come in Monday and we will work it.

Q Now, prior to this date of 4 February, 1974, during the course of your duties as a postal inspector and examiner of these items, had you prior to this date, intercepted and recovered narcotics from the mail from Thailand?

A I think so. I am pretty sure. I think we had some mail going into New York City originating in Thailand and therefore, based on that particular experience, we scrutinize mail from Thailand very carefully after that date and so I guess the mail arriving into New York City was prior to that.

Q Now, the prior experience or the incident that you speak about, was that a personal experience that you had or one that your subordinates had at the post office in New York?

A Well, I don't know how to interpret it. It is my personal experience if I discover narcotics in mail originating from a certain country that—well, I will scrutinize that mail more closely than—

Q That is not clear in my mind, sir. The prior [30] experience that you had with narcotics from Thailand on the earlier occasion, you believe there was such an experience?

A I think so.

Q Now, that prior experience, was one that you personally had in uncovering the narcotics yourself?

A Yes, sir, I am the only one opening that mail. I am the one that examines it.

Q I was not clear on that point.

Prior to the experience on the 4th of February, you believe that happened on one occasion or more than one occasion?

A I would say more than one.

Q So at least by the time of February 4, you were generally suspicious of letter mail coming from Thailand as a fact?

A Yes, sir.

Q And all mail so coming in from Thailand generally, you have this fact that raises a suspicion in your mind, is that correct, sir?

A Yes, sir.

Q I take it during the course of your regular duties, duties over the period of time indicated, that this particular airmail item appeared heavier in weight than most airmail letters, is that correct?

A Yes, sir.

[31] Q I take it during the course of your experience that airmail letters that have come in have also met the, for example, 42 gram standard?

A Oh, yes.

Q And on occasion you opened some of those, is that correct?

A Yes, sir.

Q And found no contraband, is that correct?

A No contraband, not dutiable merchandise, yes, sir.

Q All right.

So the 42 or the heavier weight caused you to go further because this was in fact Thailand which you generally have suspicions of at the beginning?

A It was—

Q The weight caused you to go further to the next procedure, is that correct?

A Yes, sir, the weight—If I may say, something else.

Q Surely.

A It is the—it is possible that in the past I had received similar envelopes this size or something. It is not necessary just the weight. You sometimes get narcotics today and then a month from now, from that

same country, you get another shipment and you say, I already got that because you [32] recognize that, some similarity, but the weight in itself would make me check it.

Q Raise a suspicion?

A Yes, sir.

Q In other words, is it fair to categorize this as intuition or intuitive?

A Yes, sir.

Q All right.

Now, you then—

MR. REARDON: Your Honor, I just want to, for the record, counsel is now—perhaps this is better left for argument, but counsel is characterizing—trying to raise an opinion from a man but the facts of the case in terms of art and the repetition of 42 grams is not essential.

MR. PALMER: Your Honor, I would say in my review of the case, this is an important factor.

THE COURT: You may proceed.

MR. PALMER: Thank you.

BY MR. PALMER:

Q And then this first letter you felt it?

A Yes, sir.

Q And it appeared to be—what did it appear to be?

A It appeared to be bulky. As I said before, it later turned out to weigh approximately 42 grams which is an ounce and a half. It was just a bulky envelope that I felt contained something.

[33] You know, if you wanted me to be specific, based on my experience, I would say this is Thailand and possibly heroin.

Q Now, when you felt the outside of the envelope, it was—you said the material was covered by a cardboard?

A Yes, I am referring to my notes. The heroin was contained in one glassine bag that was placed between two pieces of cardboard.

Q So when you felt the outside, you felt a hard cardboard substance?

A Yes, but on the other hand, if you have enough experience as I have, it is a white powdered substance and it does move. It doesn't stay flat. You shake the envelope and it falls into one particular spot. You know there is something in it. It just moves. It is not the cardboard you feel alone.

Normally we would just feel the cardboard. It is very difficult to feel through the cardboard, but you shake it a little and it moves.

Q How about in this particular case?

A I can't recall that at this time. I am just talking from general experience.

I think this is probably what happened.

Q Try to recollect the facts a. they occurred. I understand your problem. Try to recollect this particular case, [34] what happened in this case.

You indicated you felt it and you could feel the cardboard?

A Yes.

Q Do you know if in fact you felt anything else?

A Well, sir, I really didn't say that I felt the cardboard. I just felt it was bulky. There is something in there I can't tell whether it is cardboard or any other wrapping.

Q You can't say you felt it to be powder or anything like that? The essential thing was the bulky feeling?

A Yes.

MR. REARDON: He said it all went to one side.

MR. PALMER: He didn't say that.

THE COURT: Let the witness speak for himself.

MR. REARDON: I just wanted to make my objection for the record.

THE WITNESS: Well, sir, this dates back to February when I intercepted this and I intercept so many that I can't remember exactly what I did in that particular case, but the normal procedure is for me, from a certain country, weight of the envelope, bulkiness and then if the contents move, I feel it and if it moves, I know there is something in there that is not correspondence. It is

merchandise and I have to open it to check it out.

[35] I didn't know what was in there.

BY MR. PALMER:

Q And you said the main fact—strike that, Your Honor.

Now, sir, approximately how many pieces of mail do you open a day in that section?

A That is very difficult to tell too because it depends on how many narcotics, narcotic interceptions you make in one day.

If you have narcotic interceptions, which you have to open very carefully, you have to field test it and replace the contents back and all this. You have to make a record. You really can't process that many.

If you don't have it, you can work several hundred a day.

Q You might open 700 pieces of mail a day?

A Several.

Q Are you opening them in this fashion?

A Well, I do so many things. We have pornography. We have lottery. I do all these things and I didn't always open but they are also interceptions. I can't give you a definite figure.

Q I realize that. Approximately a couple hundred are opened? Approximately a couple hundred are opened a day by [36] yourself?

A Yes, possibly.

Q And of these couple hundred that are opened a day, approximately, what percentage contains contraband?

A I don't know. I don't keep a record.

Q Are many of the envelopes you open not subject to scrutiny?

A Well, some of them are not suspect seizure. If I may give you an example and if I get a mail article from a country and you want me to specify, I will say from Mexico and we know that Mexico is sending in marihuana through the mails, and I feel it and it feels like marihuana I open it and it turns out to be a hair net. That I could not tell from the outside. I have to open it to determine what is dutiable or contraband.

Q And that happens on many occasions, doesn' t it?
A It does happen, yes.
Q All right.
MR. PALMER: Will Your Honor indulge me?
THE COURT: Yes.
MR. PALMER: I have nothing further of this witness.
MR. STEIN: I have a few questions, Your Honor.

BY MR. STEIN:

[37] Q I think you indicated—I think I will call you Mr. K and that your employees stopped working on Friday and come back to work on Monday. Is that correct?
A Yes, we close the section.
Q Is that your schedule as well?
A That is my schedule. The post office normally will work all seven days, but since I am not present and we are dealing in this type of mail; for various reasons, I have to be present when this mail gets worked.
Q You work five days a week?
A Yes.
Q So when you were discussing before or trying to ascertain how long these particular envelopes may have been in the post office, I think the range was from early Saturday until Sunday?
A That is right.
Q How about Monday morning?
A Not Monday morning because—
Q Is it also possible then as early as late Friday or a time when you might go home, there would be some pieces left over?
A You see, on Friday it is our procedure, you know, we have our schedule arranged in such a way that when we leave on Friday, whatever mail is present in our particular working area [38] or section, it gets worked out.
Q Is that always the case?
A Not always.

Q Sometimes stuff is left over?
A Yes.
Q You don't kow if that is the case here or not?
A In most instances we don't have any mail left over.
Q You referred several times of opening up this mail, various types of mail.
Will you describe how that is done? How do you open an envelope?
A Well, I try to be very careful in opening an envelope.
Do I have to tell you in detail how I do that?
MR. STEIN: Your Honor, I think this is a really important question. It goes to the invasion of privacy issue. I think how they do it, why they do it, can be very important.
THE COURT: If you think it is important, you may proceed.
MR. STEIN: Thank you.
THE WITNESS: Well, I usually have a very primitive tool, an ice pick and I just peal the flap open very carefully and remove the contents and examine them and like in this [39] particular case, it goes up for control delivery and I reseal it as carefully as I open it.

BY MR. STEIN:

Q In other words, you try to open the gum area?
A Oh, yes, I do not take the knife and cut it.
Q And if there is no contraband of any kind, you would reseal that gum, is that correct?
A I would reseal the gum and indicate it has been examined by Customs.
Q How would you do that?
A We have a stamp.
Q So the person that eventually gets this mail, knows that you searched the mail?
A Yes.
Q Now, you mentioned the fact that you roughly went through 200 pieces of mail a day, an average day, opened them up, is that right?

A On some days, 200 and some days just a few. Maybe I didn't understand. An examination doesn't necessarily mean that I will open every envelope. I may examine it just by touching and looking at it. I am not going to open every piece.

Q You don't use your ice pick every time—

A Oh, no.

Q How many times a day do you use your ice pick, roughly?

[40] A Well, I have had instances where I intercepted 78 envelopes containing narcotics, heroin, cocaine and then all 78 had been opened. Maybe a few more than that, maybe ten or fifteen envelopes that turn out to be, as I said before, either a hair net or sand from a beach in Jamaica that felt like a powder and it turned out to be sand from Jamaica.

Q Now, you indicated a stamp indicating the fact that it had been opened by an official?

A Yes.

Q A rubber stamp that you put on personally?

A Well, I don't necessarily do that personally.

Q Somebody does?

A Yes.

Q About how many of those are stamped a day or is there a record of that?

A No record kept.

Q Well, these would be the ones where no contraband is found and where your suspicion was not borne out, is that right?

A True.

Q Would it be fair to say that would be in the majority of the ones that you open?

A Well, that is difficult to say. On some days it would be the majority and on some days, not. Like in this [41] particular case we had on that particular date, these envelopes were eight coming in and they all looked suspicious and they all turned out to contain heroin.

On that particular day, processing took quite some time. If it was in the afternoon, it probably took that

afternoon. I probably didn't do anything else but process these eight envelopes. It is difficult for me to answer.

Q I understand that. But it is not improbable that every day before you opened one of these envelopes, you already stamped or somebody caused to be stamped, many envelopes where there was no contraband?

MR. REARDON: Your Honor, I will object to that.

THE COURT: Objection is overruled.

BY MR. STEIN:

Q You don't use any sort of X-ray device?

A In this particular section, no.

Q You do not.

A I do not.

Q And the final question I would have is that I think you said one of the reasons you said you were suspicious was because it didn't feel like there was correspondence or letters in the envelopes. Is that correct?

A Yes.

Q All right.

[43] Q Now, in enforcing certain regulations, among them is there one which makes it illegal to put something in an envelope other than correspondence?

A Well, in an—

Q Is one required to correspond, is what I am saying, when they send a letter from another country into the United States?

A What I meant to say is that if there is paper in there, writing correspondence, then I know there is no merchandise in there and in this particular case I felt there was something in there. I had to check that out.

MR. STEIN: I have no further questions.

MR. REARDON: Just one or two.

REDIRECT EXAMINATION

BY MR. REARDON:

Q Sir, would you please describe the conditions of the envelopes, these eight pertinent envelopes, that you

saw and examined on the day in question; that is, was there any indication that they had been opened before?

A No, sir, those envelopes had not been opened before.

Q Why do you say that?

A Well, if the envelopes had been opened or if the envelopes had been damaged somehow, I would have made a notation in my records on that. I know and testify enough in court that [44] these questions will be asked of me.

I make a record to that effect. I didn't and so therefore I say no.

MR. REARDON: No other questions.

THE COURT: You may step down.

* * * *

THE COURT: In consideration of the motion to suppress tangible evidence, the opposition to the motion, the review of the authorities, after argument of counsel and the testimony of Mr. George Kallnischkies, the United States Customs Official from New York City, the motion to suppress the tangible evidence is denied.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 623-74

UNITED STATES OF AMERICA

v.

CHARLES W. RAMSEY, ET AL.

ORDER

After having reviewed carefully both the written motion of defendant Ramsey to suppress certain physical evidence in this case seized by United States customs officials on February 4, 1974, as well as the written opposition of the Government, and

Further, having heard and considered fully the oral argument of both parties in this matter, it is now this 1st day of November, 1974,

ORDERED, that the motion of defendant Ramsey to suppress the physical evidence seized by United States customs officials on February 4, 1974, is hereby denied.

/s/ [Illegible]
Judge

EXCERPTS FROM THE STIPULATION AT TRIAL

SECTION V; EVIDENCE RE: RELEVANT EVENTS OF FEBRUARY 2 — FEBRUARY 15, 1974

This Section concerns events from the date of the February 2, 1974, arrests of Bailey and Ward in Bangkok, Thailand, through the arrests of Ramsey and Kelly in Washington, D.C., including: the independent interdiction by customs authorities of eight letters filled with pure heroin in New York City on February 4, 1974; the interception of three more such envelopes at the main Post Office in Washington, D. C., on February 7, 1974; the subsequent surveillance on three local addresses on February 12, February 13, and February 14, 1974; and the pertinent seizures made incident to Ramsey's and Kelly's arrests, both on February 14 and February 15, 1974.

A. Evidence surrounding the interception of eight letters in New York on February 4, 1974.

On February 2, 1974, after Bailey and Ward had been arrested and certain evidence seized, (see Section IV, *supra*) Agent George Shoaf composed a cable in order to notify the National Headquarters of the Drug Enforcement Administration of the recent Thai developments. This cable was received by the Drug Enforcement Administration in Washington, D. C., on February 4, 1974.

Contemporaneously and independently on this same date in New York City, Customs Officer George Kallinischkies (see transcript of Motion to Suppress on October 1974, at page) intercepted and seized eight envelopes addressed to four D.C. area locations (Government Exhibits No. , , ,) from the mail. In accordance with his training and duties, he then performed a field test on a small portion of the white powder enclosed in each of the envelopes. The positive results of these preliminary chemical tests indicated the presence of heroin in each envelope. Mr. Kallinischkies thereafter at the request of the Drug Enforcement Administration initiated the controlled delivery which was to be executed on February 14, 1974, in Washington, D.C. He placed the eight envelopes in a special mail pouch and secured it with a rotary type lock number R 88592-81. Access to a lock of this type is limited to few Postal Office Employees. The pouch itself was placed inside another iron locked container and sent on its otherwise normal course to Washington, D.C.

On February 5, 1974, Agents John Atlee and John Landrum received the identities of the D.C. area addresses and addressees listed on the eight intercepted envelopes. Two envelopes were sent to each of the following addresses:

1.) Continental Printing Company
1125 D St., N.E.
Washington, D.C. 20002

2.) Miss Mary Richardson
311 Rock Creek Church Rd., N.W.
Washington, D.C. 20011

3.) Miss Shirley Hill
5109 Mann
Deanwood, Maryland 20027

4.) Miss D. Kelly
1622 Perry St., N.E.
Washington, D.C. 20018

"1125 D St., N.E." has already been discussed, *supra*, in Sections I, III, and IV. Reference to "311 Rock Creek Church Rd., N.W." similarly is found, *supra*, in Sections I and Section IV. Government witness Charles Adams, who has resided at this address since December 10, 1973, has no knowledge of the existence of the purported addressee "Mary Richardson." Mr. Mark Coppedge, who resided at the address between 1970 and December 9, 1973, also has no such knowledge. Charles Adams, as mentioned, *supra*, was the co-lessee, along with defendant Kelly of the "R & R Barber Shop," 908 9th Street, N.W., Washington, D.C.

5109 Mann Street, Deanewood, Maryland is the address of a private home owned by government witness Napolean Hill. Mr. Hill is the estranged husband of government witness Martha Hill who is the sister of defendant Kelly. Mrs. Hill was arrested along with her brother, Dorothea Ellis, her brother's common law wife, and defendant Ramsey on February 14, 1974 in the immediate vicinity of 13 S Street, N.E., Washington, D.C. At the time of her arrest, she was seated in her automobile.

Mr. Hill himself had known defendant Kelly for over thirty-three years. In fact, during the summer of 1973, after Kelly had left Lorton, Virginia, Mr. Hill let him stay at his home for approximately six weeks. Both Mr. and Mrs. Hill deny ever knowing anyone by the name of addressee "Shirley Hill". For Mr. Hill's reaction and the search of his house following the arrest of Kelly, see this section, part E, *supra*.

1622 Perry Street, N.E. is a non-existent address. However, immediate members of defendant Kelly's family have resided at 2216 Perry Street, N.E. for many years. Both government witnesses Thomas Kelly (brother of defendant Kelly and the resident at all times material to the instant case) and Martha Hill confirm this fact. The addressee on all eleven pertinent letters (see Section IV, *supra*, at) including the two seized by Mr. Kallinischkies was Miss D. Kelly. Dorothy Ann Ellis has lived at all times material to the case with defendant Kelly at 1803 Belle Haven Drive, Apartment 302, Landover, Maryland. The phone number 301-341-5372 was at all times material to this case listed and billed to "D. Kelly, 1803 Belle Haven Drive, Apt. 302, Landover, Maryland 20785 (Government Exhibit #). The relevant lease agreement for 1803 Belle Haven Drive, Apt. 302, itself, names "James W. and Doretha E. Kelly" as the tenants (Government Exhibit #). The lease was signed on February 2, 1973, by "James W. Kelly and Doretha Ann Kelly" who had purportedly been married for 18 months at the time of the execution of the lease. Defendant Kelly's and Miss Ellis' signatures on the lease have both been positively identified by handwriting ex-

pert W.A. Schullenberger of the United States Treasury Department. Moreover, a 1973 Georgetown University wage and tax statement seized pursuant to a United State's Magistrate's search warrant on February 14, 1974 contained the name D. Ellis and a home address of 2216 Perry Street, N.W., Washington, D.C. Charles Adams of 311 Rock Creek Church Road, N.W., was listed in the lease application as both the work supervisor over and personal reference of defendant Kelly.

On February 5, 1974, Agents Landrum and Atlee alerted the United States Postal Inspector Richard Hall of the New York Customs seizure of the eight envelopes. A complete description of the envelopes seized—including those in Bangkok, Thailand—was given to Inspector Hall. Subsequently, on February 7, 1974, Inspector Hall notified Agent Atlee of the interception and temporary detaining under controlled conditions at the Main United States Post Office in Washington, D.C. of three brown bulky envelopes addressed to "Continental Printing Company, 1125 "D" Street, N.E." bearing Thai postage; the label "airmail" stamped in red; and measuring six and three quarters inches by four and one-half inches. Inspector Hall further related that approximately thirty envelopes met a description of the above three envelopes had been delivered to Continental Printing Company, 1125 "D" Street, N.E., since December 1973. This information was the result of an interview with Willie Askew, the postal carrier for the address.

On February 7, 1974, Special Agents Landrum and Atlee obtained a United States Magistrate's Search Warrant for the three envelopes intercepted and retained by United States Postal Service at Main Post Office, N. Capitol and Massachusetts Avenue, N.W., Washington, D.C. On the same date, Special Agents Landrum and Atlee, after serving the warrant on Postmaster Simms, Main Post Office, Washington, D.C., searched the envelopes, conducted a field test on the white powder, and received a positive reaction on the Marquis reagent for an opiate drug. Drug Exhibits #3, 4, and 5, addressed to Continental Printing Company, 1125 "D" Street, N.E., were seized pursuant to the warrant. They were trans-

ported to the Washington District Office on the same date, stored in a locked cabinet, and delivered to Region 4 Laboratory on February 12, 1974 by Special Agents Landrum and Atlee. On February 13, 1974, Region 4 Laboratory advised Washington District Office that drug Exhibits #3, 4, and 5 contained heroin hydrochloride in the following respective amounts: 92.5%, 75.4% and 84.6%. The containers (drug Exhibits #3A, 4A and 5A, respectively) were transported to the Federal Bureau of Investigation Laboratory on February 26, 1974 for fingerprint analysis.

On February 12, 1974 under controlled conditions, Postal Inspector Hall received from the Main Washington D.C. Post Office, Union Station Section rotary lock pouch #R88592-81. Inspector Hall opened the lock—thereby adding one digit to the number—and retrieved from within the pouch all eight letters intercepted in New York on February 4, 1974.

On the same date, after having obtained a United States Magistrate's Search Warrant for the eight envelopes, Agents Atlee and Landrum then conducted in the view of Inspector Hall the same type of preliminary chemical analysis of a small portion of white powder in each of the eight envelopes as had Customs Officer Kallinischkies. Like the earlier one, these tests also indicated the presence of heroin. Thereupon, the agents, to safeguard the valuable narcotics evidence while unhindering the planned controlled delivery of the eight envelopes, removed all but approximately one-half gram of the suspected heroin from each of the eight envelopes. The original powder removed from each envelope was then placed in a corresponding evidence envelope and identified fully by address. They were at that time designated and remain as government drug exhibits 6 through 13. (Drug Enforcement Administration Laboratory Numbers are #28894, 28895, 28896, 28897, 28898, 28899, 288900, and 28901) Drug Enforcement Administration chemist Earl F. Parrish—a veteran expert in the field of identifying the presence and percentage of heroin, who had in this capacity testified numerous times in this Court, anal-

ysed government drug exhibits 3 through 13. While the individual analysis of each drug exhibit is of course being submitted to the court, a summary of Mr. Parrish's findings on these drug exhibits is as follows:

Exhibit	Lab #	Cross Wgt. (gms)	Net Wgt. (gms)	Drug	Purity
(Exhibits #1 and #2 were obtained in an earlier phase of this investigation and are not applicable to this prosecution.)					
3	28891	40.7	17.240	Heroin	92.5
4	28892	37.6	14.490	Heroin	75.4
5	28893	38.9	15.640	Heroin	84.6
6	28894	36.5	13.330	Heroin	74.7
7	28895	39.0	15.790	Heroin	91.0
8	28896	45.3	22.190	Heroin	77.3
9	28897	40.7	17.760	Heroin	92.3
10	28898	33.5	10.570	Heroin	83.3
11	28899	40.2	17.100	Heroin	85.5
12	28900	40.4	17.300	Heroin	87.9
13	28901	38.6	15.090	Heroin	78.5

Agents Atlee and Landrum as witnessed by Inspector Hall then substituted lactose for the seized a portion of heroin in each of the eight original containers which were and still are designated as government Exhibits 6A through 13A. The newly formed mass of each of these eight original envelopes contained therefore a large portion of lactose and a small portion of suspected heroin. Each quantity of powder was then and continues to be designated as Government Exhibit 6 "substitute" through Exhibit 13 "substitute" (corresponding Drug Enforcement Laboratory Numbers 28907, 28930, 28931, 28907, 28908, 28908, 28908) Drug Enforcement Administration Chemist Parrish examined these exhibits with the following results:

Envelope	Address	Drug Exhibit	Lab #	Gross Wgt	Net Wgt	Purity
6A	1125 D St., NE	6-substitute	28907	62.2	37.870	0.3
7A	1125 D St., NE	7-substitute	28907			
8A	1622 Perry St., NE	8-substitute	28930	101.9	47.270	1.4
9A	1622 Perry St., NE	9-substitute	28931	71.3	29.680	1.6
10A	311 Rock Creek Church Rd., NW	10-substitute	28907	45.8	22.720	0.2
11A	311 Rock Creek Church Rd., NW	11-substitute	28908	61.2	38.110	0.4
12A	5109 Mann St. Deanwood, Md.	12-substitute	28908	70.2	47.140	0.1
13A	5109 Mann St. Deanwood, Md.	13-substitute	28908	69.7	46.640	0.2

All the above exhibits drug content was heroin.

All the above exhibits except 8A and 9A were in fact delivered under controlled conditions on February 14, 1974.

After completing the substitution—during which he had noticed the initials of Customs Officer George Kallinischkies inside each envelope—Agent Landrum himself initialed the interiors of all eight envelopes. Thereafter, the agents resealed the eight envelopes and allowed them to remain in normal postal channels in anticipation of the controlled deliveries which were to occur two days later on February 14, 1973. Before the ultimate controlled deliveries, Inspector Hall, in the presence of Agent Landrum, placed flourescent powder in each of the envelopes.

B. The surveillance of February 12, 1974

On February 12, 1974, Special Agents of the Drug Enforcement Administration initiated surveillances at the following addresses:

Special Agent	Addresses
Michael Grimes	1803 Belle Haven Drive, Landover, Md.
Larry J. Carrol and Thomas J. Salvatore	5109 Mann St., Deanewood, Md.
Thomas T. Sheehan and Ernest L. Staples	1125 "D" St., N.E.
J. James Rivera	311 Rock Creek Church Rd., N.W.

At approximately 11:15 A.M., on that date, Special Agent Grimes initiated surveillance at the above address. At that time, Special Agent Grimes observed the following vehicles in the vicinity of 1803 Belle Haven Drive: a 1972 green Mercury Cougar, Maryland Registration # PG-2809; and a 1966 black over red Cadillac, Washington D.C. Registration # 988-189. A check with Washington, D.C. Department of Motor Vehicles revealed that the D.C. Registration # 988-189 is listed to Clifton M. Boykins at 1230 13th Street, N.W., Apt. 914, Washington, D.C., on a 1966 black/red Cadillac. At approximately 11:30 A.M., Grimes observed a 1972 silver-gray Lincoln, Mark IV, D.C. Registration #921-415, park in front of 1803 Belle Haven Drive. At this time, he saw a black male whom he later identified from police photographs as defendant James W. Kelly, exit the passenger side of the Lincoln and carry a brown paper bag into 1803 Belle Haven Drive. Agent Grimes took pictures at this time with a Nikon camera mounted with 300mm lens (Government Exhibit # ————). The Lincoln then departed the area. A check with D.C. Department of Motor Vehicles disclosed that D.C. Registration # 921-415 is listed to Thomas Henry Young, 3224 19th Street, N.W., Washington, D.C. The above Lincoln is documented as a vehicle exclusively utilized by Charles W. Ramsey, although registered to Thomas Young. Agent Grimes was unable to fully view the driver of the Lincoln on February 12, 1974, but could see clearly enough into the Lincoln to determine the driver was a heavy-set black male with short hair. At approximately 12:35 P.M., he observed Kelly and a black female, later identified via police photographs as Doretha A. Ellis, depart 1803 Belle Haven Drive. He observed Ellis enter the Cougar, Maryland Registration # PG-2809 while Kelly entered the Cadillac bearing D.C. Registration #988-189. He followed both vehicles for approximately ¼ mile to the vicinity of Sheriff Road, where both vehicles stopped on the shoulder of the road. At this time, he saw Ellis and Kelly switch automobiles. Both vehicles then continued on Sheriff Road for approximately ½ mile under his observation. At that time, they again

pulled off onto the shoulder of the road. He saw Ellis and Kelly again switch vehicles so that each was in the vehicle she/he had at the beginning of this surveillance. Shortly thereafter, Agent Grimes lost contact with Kelly, who was driving the red Cadillac, but maintained contact with Ellis in the Cougar. He followed Ellis to Citizens Bank and Trust Company, George Palmer Highway and Sheriff Road, Maryland, where he observed Ellis make a cash deposit. Contact with Ellis was lost shortly thereafter. At approximately 1:00 P.M. this date, Special Agents Carroll and Salvatore observed a black male wearing a dark shirt or pullover knit sweater and fur cossack type hat, park a black over red two-door Cadillac in front of 5109 Mann Street, Deanewood, Maryland (an address to which two of the heroin laden envelopes were destined). Special Agents Carroll and Salvatore then observed the above black male exit the Cadillac walk over the mailbox located on a fence at 5109 Mann Street, and check the mail box by placing his hand in its vicinity. Special Agents Carroll and Salvatore observed the black male immediately return to the red Cadillac and depart the area. Because of the actions of the driver of the red Cadillac, Special Agents Carroll and Salvatore did not maintain surveillance or get close enough to the automobile to obtain a registration number. At approximately 1:12 P.M. this date, Special Agent Staples observed a black male later identified by him via police photographs as defendant James W. Kelly, park a two-door black over red Cadillac, D.C. Registration # 988-189 in the vicinity of 1125 "D" Street, N.E. (Special Agent Staples took pictures of Kelly and the Cadillac at this time, designated Government Exhibit # ———). Special Agent Staples observed Kelly wearing a tan coat with a dark fur collar and fur cossack type hat, and carrying a manila envelope, exit the red Cadillac, walk over to the front door of 1125 "D" Street, N.E. (an address to which heroin-laden envelopes were destined) open the door with a key, and enter the building. Special Agent Staples noted Kelly appeared to thoroughly view all vehicles and persons near him as he proceeded toward

the entrance of 1125 "D" Street, N.E. At approximately 1:20 P.M., Special Agent Staples saw Kelly depart 1125 "D" Street, N.E., carrying what appeared to be the same manila envelope noted above, enter the red Cadillac, and proceed north on 12th Street, N.E. At approximately 1:45 P.M. that same date, Special Agent Rivera observed a two-door black over red Cadillac park in the vicinity of 311 Rock Creek Church Road, N.W. (another address to which two heroin-laden envelopes were destined). Special Agent Rivera saw a black male later identified as defendant James W. Kelly, wearing a tan coat with fur collar and fur cossack style hat exit the aforementioned Cadillac, walk to the front door of 311 Rock Creek Church Road, N.W., open the front door in which there was a mail slot, and bend over as if to reach for something on the floor immediately in front of him. Defendant Kelly then shut the door, returned to the Cadillac and departed the area under the observation of Agent Rivera. At approximately 3:45 P.M., Special Agents Carroll and Salvatore observed the two-door black over red Cadillac, previously seen by them at approximately 1:00 P.M. that date, return to 5109 Mann Street, Deanewood, Maryland. They observed the Cadillac with approximately four passengers park in the driveway of 5109 Mann Street. At the time, grocery type packages were seen taken into 5109 Mann Street by the occupants of the red Cadillac. Special Agents Carroll and Salvatore observed a black male wearing a tan coat with fur collar and fur cossack style hat among the occupants of the red Cadillac. Special Agents Carroll and Salvatore were joined by Special Agent Grimes at approximately 4:00 p.m. At that time, Special Agent Grimes drove past the Cadillac and noted that the registration was D.C. #988-189. Special Agent Rivera joined Special Agents Carroll, Salvatore and Grimes a short time later and identified the red Cadillac as the same vehicle he (Rivera) had seen earlier that date (at approximately 1:45 p.m.) at 311 Rock Creek Church Road, N.W. An unidentified black male was observed by the above Agents to wash the red Cadillac. Surveillance was discontinued shortly thereafter.

C. The surveillance of February 13, 1974

On February 13, 1974, surveillance was established at the following addresses by Sepecial Agents of the Drug Enforcement Administration:

Special Agents	Addresses
Thomas Sheehan	1125 "D" Street, N.E.
Carroll, Salvatore and Grimes	5109 Mann Street Deanewood, Maryland

At approximately 12:10 p.m. that date, Special Agent Sheehan, who was maintaining a stationary surveillance at 1125 "D" Street, N.E., from the interior of a government surveillance truck, saw individuals he knew to be defendants Ramsey and Kelly in a green 1972 Dodge Swinger, Maryland Registration #KS-9927 parked behind his truck which was across the street from 1125 "D" Street, N.E. Kelly exited the driver's side of the Dodge with a small black dog and walked East on "D" Street, while Ramsey remained seated in a slumped position in the vehicle. Special Agent Sheehan noticed that Kelly appeared to thoroughly view all persons and vehicles in the vicinity of 1125 "D" Street, N.E., and to pay particular attention to his surveillance vehicle. Agent Sheehan then observed Kelly return to the Dodge and place the dog therein. At this time, he saw Kelly walk to the entrance of 1125 "D" Street, N.E., take a key from his pocket, unlock the door, look around the street briefly and enter the building. A short time later Special Agent Sheehan observed Kelly leave 1125 "D" Street, N.E. and rejoin Ramsey in the Dodge. Ramsey and Kelly then pulled along side the government truck, stopped and visually inspected the truck. They then proceeded East on "D" Street to the intersection of 12th Street, turned North and again stopped. At that time, Agent Sheehan noticed that both Ramsey and Kelly stared in the direction of the surveillance truck. Shortly thereafter, Ramsey and Kelly proceeded North on 12th Street, out of the view of Agent Sheehan. Approximately three minutes later, Agent Sheehan again observed Ramsey and Kelly coming East on "D" Street, N.E. in the

Dodge Swinger. The driver, Kelly, drove slowly past the surveillance vehicle and visually studied it closely again while Ramsey slumped in the passenger seat obviously trying to avoid being observed. Agent Sheehan observed the Dodge proceed to the intersection at 12th Street, turn South and disappear from view. At approximately 12:40 P.M. that date, Special Agents Grimes, Carroll and Salvatore saw Ramsey and Kelly in the Dodge Swinger, Maryland Registration # KS-9927, stop in front of 5109 Mann Street, Deanewood, Maryland. At that time, the above Agents saw Kelly exit the driver's side of the Dodge Swinger and walk over to the mailbox located at the fence of 5109 Mann Street. He opened the mailbox; looked in it; and then closed it.

Kelly re-entered the Dodge Swinger and proceeded to the 1300 block of H Street, N.E., under observation of Special Agents Grimes, Carroll, Salvatore and Mangan, who joined the other Agents then during the moving surveillance. The above Special Agents then observed Ramsey enter 1341 H Street while Kelly remained in the Dodge Swinger. Approximately 10 minutes later, Ramsey was observed by the above Agents to exit 1341 H Street and rejoin Kelly in the Dodge Swinger. The above agents then followed Kelly and Ramsey to the vicinity of Florida Avenue and New York Avenue, N.E., where contact was lost in heavy traffic. The car in which Ramsey and Kelly were riding on this date was listed to Kelly's sister, Martha Hill, and is the same car used by Kelly, et al. on February 14, 1974 to make his mail rounds.

D. The surveillances of February 14, 1974:

On February 14, 1974, at approximately 9:00 a.m., United States Postal Inspectors Richard Hall, E. D. Strasburg, and H.L. Stuart met with Special Agents of the Drug Enforcement Administration in order to make final preparations for controlled deliveries of six of the eight New York intercepted heroin letters[1] (Drug Ex-

[1] Officials did not execute delivery of the two letters sent to Miss D. Kelly at 1622 Perry St., N.E. because there was no such address.

hibits Six Substitute, Seven Substitute, Ten Substitute, Eleven Substitute, Twelve Substitute, and Thirteen Substitute) to three Washington area addresses: 1125 D Street, N.E., 311 Rock Creek Church Road, N.W., and 5109 Mann Street, Deanewood, Maryland. Florescent powder was placed in each envelope which was to be delivered. Postal Inspector Hall maintained custody of the two heroin envelopes which were addressed to Continental Printing Company, 1125 D Street, N.E., Washington, D.C. (Exhibits 6A and 7A, containing Drug Exhibits 6 Substitute and 7 Substitute, respectively) and transferred custody of four other heroin envelopes as follows:[2] Postal Inspector E. Strasburg—two envelopes (Exhibits 10A and 11A, containing Drug Exhibits Ten Substitute and Eleven Substitute, respectively) addressed to Miss Mary Richardson, 311 Rock Creek Church Road, N.W., Washington, D.C.; and Postal Inspector H. L. Stuart—two envelopes (Exhibits 12A and 13A, containing Drug Exhibits Twelve Substitute and Thirteen Substitute, respectively addressed to: Miss Shirley Hill, 5109 Mann Street, Deanewood, Maryland.

Custody of the aforementioned exhibits was transferred to U.S. mail carriers in the vicinity of the appropriate address on February 14, 1974. At approximately 11:00 a.m., Postal Inspector Hall, as witnessed by Special Agent Staples, transferred Exhibits 6A/Six Substitute and 7A/Seven Substitute to mail carrier Willie Askew at 10th and D Street, N.E. Special Agents Staples and Sheehan then observed Askew deliver the letters to 1125 D Street, N.E., at approximately 11:07 a.m. Mr. Askew put the envelopes through a door slot in the front door of the

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Apparently the Kelly family home Perry St. number "2216" was erroneously transposed by Bailey when she shifted her operation from Aschaffenburg, Germany to Bangkok, Thailand in late January of 1974.

[2] A copy of a U.S. Post Office form entitled, "Chain of Custody for Seizure to be used as Court Exhibit in Criminal Case," reflects the chain of custody on the aforementioned exhibits from their interception by U.S. Customs, New York, New York, to the postal carriers who completed the controlled delivery (Government Exhibit No.).

address. At approximately 11:12 a.m. Postal Inspector Strasburg, as witnessed by Special Agents Julian Lindenauer and Kenneth Knorr, transferred Exhibits 10A/Ten Substitute and 11A/Eleven Substitute to mail carrier Robert W. Lewis, Jr.,[3] at Illinois Avenue and Rudolph Street, N.W.—approximately one block from 311 Rock Creek Church Road, N.W. At approximately 11:10 a.m., Special Agents Gerald Masiello and F. J. Watkins saw mail carrier Lewis deliver the two letters to 311 Rock Creek Church Road by placing the letters through a front door slot at that address. At approximately 11:05 a.m., Postal Inspector H. L. Stuart, as witnessed by Special Agent Grimes, transferred Exhibits 12A/Twelve Substitute and 13A/Thirteen Substitute to mail carrier S. L. Dennis[4] at 1101 Addison Road, N.E., Washington, D.C. At approximately 11:23 a.m., Special Agents Grimes, John King, and John Sauer saw Mr. Lewis deliver the two letters to 5109 Mann Street, by placing the mail in a mail box adjacent to and inside of the front gate to that address.

Approximately two hours later all six delivered envelopes and their contents were to be recovered by Drug Enforcement Administration Agents in the immediate vicinity of 13 S Street, N.E., from the immediate possession of defendant Kelly, after defendant Ramsey had moments before—at the outset of the arrests—sought to relinquish his own possession of the bag of marked envelopes and other evidence which Kelly had delivered to him.

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[3] Mr. Lewis had delivered 3-4 envelopes similar to those to be delivered on this date to 311 Rock Creek Church Rd. during the preceding two weeks. The envelopes were more square in shape than usual and fatter. They bore foreign postage. They were light blue or gray.

[4] Mr. Dennis had at this time been delivering mail to 5109 Mann St., N.E. for about one year. He had delivered white or light blue square-shaped envelopes with Thai postage to the address—once in January and once in February, 1974. "Shirley Hill" was the addressee on both envelopes. The envelopes themselves were bulky and appeared to contain a powdery substance that was itself between cardboard-type material. Neither prior letter to "Shirley Hill" had been returned to him as unclaimed.

On February 14, 1974,—simultaneously with the delivery by the United States mail service of the above-noted exhibits—surveillance was established by Special Agents and U.S. Postal Inspectors at the following Washington area addresses: Special Agents Puglia, Mangan, Garrett, Perry and Atlee—1803 Belle Haven Drive, Landover, Maryland; Special Agents Carroll, Salvatore, Sauer, King and Grimes, along with Postal Inspector H. L. Stuart,—5109 Mann Street, Deanewood, Maryland; Special Agents Sherbine, O'Neil, Marshal Story, Sheehan and Staples, Postal Inspector R. D. Hall—1125 D Street, N.E., Washington, D.C.; Special Agents Masiello, Watkins, Lindenauer, Knorr, Postal Inspector E. D. Strasburg—311 Rock Creek Church Road.

At approximately 12:30 p.m., Agent Sheehan, who had established a fixed observation post at 1125 D Street, N.E., from within a Government surveillance truck, observed a green Dodge Swinger parked directly behind his position. Special Agent Sheehan then observed Kelly, Ellis and Hill as they left the car and walked to the front entrance of 1125 D Street, N.E. Kelly then unlocked the door and all three persons entered. At this time, Kelly was carrying a brown paper bag. At approximately 12:45 p.m., Special Agent Sheehan observed Kelly, Ellis and Hill as they left 1125 D Street; re-enter the Dodge Swinger belonging to Mrs. Hill and left the vicinity by proceeding east on D Street and then north on 12th St. Agent Sheehan noted that Kelly departed 1125 D Street, carrying what appeared to be the same brown bag that he initially took into this address. Special Agents Staples, Grimes, Atlee and other Special Agents, as well as U.S. Postal Inspectors, all observed the green Dodge Swinger with the three suspects as they departed the area of 1125 D Street, N.E. The agents followed them to the vicinity of Second Street, N.W., approximately one-half block north of Rhode Island Avenue, N.W. Agents Grimes and Atlee observed the green car parked on the east side of Second Street, N.W., approximately midway between Rhode Island Avenue and T Street, N.W. At approximately 12:55 p.m., Agent Grimes

observed Kelly exit the car and walk across Second Street and enter a building. At approximately 1:00 p.m., Agents Grimes, Sheehan, O'Neil and Atlee saw Kelly re-enter the Dodge Swinger and proceed north on Second Street, N.W. Agents Grimes, Sheehan, O'Neil, other agents as well as U.S. Postal Inspectors, followed the car to the vicinity of 311 Rock Creek Church Road.

At approximately 1:07 p.m., Special Agents Watkins and Masiello, who had established surveillance in the vicinity of 311 Rock Creek Church Road, N.W., earlier this date, observed the green Dodge Swinger as it parked in front of Charles Adams' house at 311 Rock Creek Church Road, N.W. Shortly thereafter, Agents Watkins and Masiello saw Kelly exit the car, walk to the front door of 311 Rock Creek Church Road, and return a short time later carrying what appeared to be envelopes. Kelly, in fact entered the house and asked the sixteen-year old daughter of Charles Adams—Gwynn Adams—whether there was any mail for him. Miss Adams thereupon gave defendant Kelly the two "Mary Richardson" letters addressed to 311 Rock Creek Church Road, N.W. It should be noted that defendant Kelly's own sister corroborates generally the material events of this date, including the mail pickup by Kelly at 311 Rock Creek Church Road.

At approximately 1:08 p.m., Agents Watkins and Masiello saw Kelly rejoin the other two suspects in the Dodge Swinger and then proceed south on Rock Creek Church Road. Agents Grimes, Sheehan, O'Neil, Atlee and other Special Agents, as well as U.S. Postal Inspectors, followed the three suspects to the unit block of S Street, N.E., between North Capitol Street and Lincoln Road. Kelly arrived there at approximately 1:15 p.m. At that time, Special Agent Atlee observed Kelly park the Dodge Swinger on the north side of S Street, N.E., slightly below the intersection of Lincoln Road. The car was facing west towards North Capitol Street. Shortly thereafter, Agent Clinton Perry saw Kelly exit the car carrying a brown paper bag. Kelly walked away from the car and to 13 S Street, N.E., where he walked up a flight of stairs. At approximately the same time, Agent Staples,

who was located in the unit block of S Street, N.W., and who was using binoculars, saw a black male, later identified as Ramsey, in a silver gray lincoln, D.C. Registration No. 921-415, drive slowly past the Dodge Swinger in a westward direction. Agent Staples observed Ramsey as he began to circle the block slowly. When Ramsey returned he parked in the middle of S Street, facing west, approximately one car length in front of the Dodge Swinger. As Ramsey was parking on S Street, N.E., Agent Perry, who was walking north on Lincoln Road, saw Kelly with the brown paper bag in his left hand as he walked down the front steps of 13 S Street, N.E., and directly to the open window on the driver's side of Ramsey's car. Agent Perry who was located behind Kelly, then saw him place his right hand and arm on top of Ramsey's car and lean forward. Kelly put the brown paper bag that he was carrying in his left hand into the driver's side of Ramsey's car. Agent Staples then observed Kelly as he withdrew his left hand but not the paper bag. At this time, Agent Staples advised other agents by radio that Ramsey had now received the brown paper bag from Kelly. In response to Agent Staples' observation, Special Agent Puglia advised all the agents via radio to arrest the suspects. *Immediately*, agents blocked both ends of the unit block of S Street, N.E. Cars filled with agents pulled up to the rear and front of Ramsey and Kelly. There occurred at this time a great deal of tire screeching. Kelly was then observed by Agent Perry, who was standing approximately thirty feet from him, to look rapidly east and west on S Street, N.E. At approximately the same time, Agents King and Sauer, who had blocked Ramsey's departure, observed a brown paper bag as it came from within Ramsey's automobile and into the midriff and hands of Kelly. Agents Perry, King, and Sauer then observed Kelly with the brown paper bag as he walked away from Ramsey's automobile towards his sister's Dodge Swinger. Agent Perry identified himself and placed Kelly under arrest, as Kelly reached the front fender of the car. Agent Perry ordered Kelly to place

the brown paper bag on the hood of the Dodge Swinger. Kelly did so. Thereafter, Agent Staples joined Agent Perry and took possession of the brown paper bag (Government Exhibit No.) which contained all six delivered envelopes (Exhibits 6A/Six Substitute, 7A/Seven Substitute, 10A/Ten Substitute, 11A/Eleven Substitute, 12A/Twelve Substitute, 13A/Thirteen Substitute); $1,-100 in cash (Government Exhibit No.) contained in a white envelope (Government Exhibit No.); cutting material (Drug Exhibit No. , Lab No.) contained in a white envelope (Government Exhibit No.) bearing the inscription, "Charlie, he will have five blocks Sunday, so he says." At the same time, Agents Sauer and Mangan arrested Ramsey as he was seated in the Lincoln. Agents Staples and Atlee arrested Ellis and Hill, who had remained seated in the Dodge Swinger.

Agents later found large amounts of florescent powder on both sides of Kelly's hands and on the front part of his sweater. Similarly, large amounts of florescent powder were found on both sides of Miss Ellis' hands. A few specks of the florescent powder were found on Ramsey's hands.

E. Seizures Incidental to February 14, 1974:

When defendant Ramsey was arrested on February 14, 1974, in front of his 13 S Street, N.E., residence, Agent Richard Mangan seized from his person:

1. A letter addressed to Charles Ramsey at "13 S Street, N.E., Washington, D.C." (Government Exhibit No.).
2. A registered mail receipt # 340763 for $10,-000 from "Charles Jones" (a name often found as the payor in cashier's checks to Gilda Buck during the relevant November—February period) with the listed address 13 S Street, N.E., Washington, D.C. 20002 and apparently received to insure material sent to "Mrs. Gilda Buck, 4818 Burnet Rd., Austin, Texas." (Government Exhibit. No.).
3. A notepad containing the telephone number of "Bally" (sic) in "Aschassemberg, (sic) Germany,"

06021-731-33 (the target of the German wire intercept; and the unmonitored number of Bailey's mother, "Murril" (06021) 29156 (see Section III, *supra*, page); and also containing the inscription "Hotel Hyatt Rama, Bangkok, Thailand." (Government Exhibit No.). Charles Ramsey has been positively identified as the writer of the written portions cited, *supra*, by W. A. Schulenberger, handwriting expert from the United States Treasury Department.

4. Laminated identification cards for savings accounts at both the Riggs National Bank of Washington, D.C. (# 00-883-608) and the American Security and Trust Company (# 17-96438221), both in the name of Charles W. Ramsey. (Government Exhibit No.).

5. A personal telephone directory. (Government Exhibit No.).

6. A small red personal address book with the notation "Sister Bailey, 512-398-5495 hm, 452-1001 wk" inside of the front cover; and the inscription "S. Bailey # 6021-73133 # 6021-29156" which appears on the inside rear cover. Defendant Ramsey has been positively identified as the writer of both these notations by W. A. Schulenberger.

Of course, all six delivered letters[5]—2 each to: Continental Printing, 1125 D Street, N.E.; Miss Mary Richardson, 311 Rock Creek Church Rd., N.W.; and Miss Shirley Hill, 5109 Mann St., Deanewood, Maryland—were seized from the immediate actual possession of defendant Kelly by Agents Perry and Staples. Mannitol was also found in Kelly's brown bag (Drug Exhibit No. 19, Lab No. 28911).

Drug Enforcement Administration Special Agents thereafter obtained U.S. Magistrate's search warrants for the following addresses:

[5] On May 7, 1974, F.B.I. Agent James Tucker in the presence of Agent Atlee photographed these six delivered letters seized from Kelly (as well as the three undelivered letters to Continental Printing (Government Exhibits).

1. 1125 D Street, N.E., Washington, D.C.
2. 13 S Street, N.E., Washington, D.C.
3. 311 Rock Creek Church Rd., N.W. Washington, D.C.
4. 5109 Mann St., Deanewood, Maryland.
5. 1803 Belle Haven Dr., Apt. 302, Landover, Maryland.

The results of the 1125 D St., N.E., raid on February 14, 1974, were prodigious. Among those things seized were: one Trimaway diet scale and orange plastic bowl contained in the Trimaway box; one Pelouze scale (white) Model YG-400; used Aluminum foil box (30 sq. ft.); one "baggies" box (used 80 bag); one "baggies" box (used 150 bag); "Handi-Wrap Ziploc" box (used); measuring cup; Kitchen Craft food storage bags (used box); two strainers; used Reynolds Wrap aluminum foil box (100 Sq. ft.); forty-seven cut pieces of aluminum foil; three plastic baggies and one hard plastic container. (Government Exhibit No.). Agents also discovered 458.3 grams of Mannitol—a "cutting" or diluting chemical powder (Government Drug Exhibit No. 20, Lab. No.

Extremely revealing were the seven torn pieces of paper seized from the bottom of a trash can inside 1125 D Street, N.E., by Agent Thomas Sheehan. When fit together, the pieces formed a note which stated:

> James, as I mentioned the Equipment is in route so I would appreciate you checking Shirley, Perry and Charlie out this morning and every morning hereafter. R.
>
> (Government Exhibit No.)

Defendant Ramsey has been positively identified by handwriting expert W. A. Schulenberger as the writer of the note. (Shirley Hill, 5109 Mann St., Deanewood, Md.; 2216 Perry St., N.E.; Charlie Adams, 311 Rock Creek Church Rd., N.W.).

The February 15, 1974, execution of a U. S. Magistrate's warrant for 13 S Street, N.E., resulted in the seizure by Drug Enforcement Administration Agents of Ramsey's inscriptions on a cardboard sheet and his cal-

endar notepad (Government Exhibit No.) from his kitchen counter. On the cardboard the phone numbers of Sylvia Bailey and her mother are again listed as is Bailey's address. Gilda Buck's home and business phones are both listed. In the calendar notebook on the dates January 24, 25, and 26, 1974, there are three notations:

1. We are to confirm contracts and place cash deposit for desired package.
2. We are to confirm date and place cash deposit to assure date. Melvin Johnson to S. B.
3. End of World Serious.

W. A. Schulenberger has positively identified Charles Ramsey as the writer of all three statements. Ramsey is identified "in all probability" as the writer of "Silver 06021 73133" on the 1973 September calendar.

The February 14, 1974, execution of a United States Magistrate's search warrant for Charles Adams' residence at 311 Rock Creek Church Road, N.W., by Drug Enforcement Administration Agents resulted in seizure of defendant Ramsey's motion for a new trial. (Government Exhibit No.) and a copy of Kelly's and Adams' lease for the R & R Barber Shop at 908 9th Street, N.W. (Government Exhibit No.). The execution of another United States Magistrate's search warrant on Napoleon Hill's residence at 5109 Mann St., Deanewood, Maryland, resulted in the seizure of a letter to James W. Kelly, 5109 Mann Street, N.E., Washington, D.C. 20027. When Napoleon Hill, owner of the home, confronted Kelly after the raid on his home, Kelly said, "They were looking for me, man. That's what they were doing. Looking for me." Mr. Hill asked, "Looking for what?" Kelly replied, "The dope." When Mrs. Martha Hill, whose car Kelly used, confronted her brother, Kelly told her "It was just one of those things." She told him, "If you'd told me what you were doing, I'd never been with you." He said "I had no reason to tell you." He also told her, "You don't know nothing and you don't know nothing and I'm not telling you nothing." Kelly apologized; said that he didn't want it (the arrest of his epileptic sister) to happen; and that he never would have done it if he knew something would have happened to" her.

F. This subsection relates certain additional evidence regarding the events of February 15, 1974, concerning the search of 13 S Street, Northeast, Apartment Two, Washington, D.C., relating particularly to the offenses alleged in Criminal Case Number 74-624.

1. On February 15, 1974, during the execution of a United States Magistrate Search Warrant numbered 74-252M(CR) for the premises of 13 S Street, Northeast, Apartment Two, Washington, D.C., Special Agent Michael E. Grimes of the Drug Enforcement Administration had in his possession that Search Warrant numbered 74-252M(CR). He and other agents of the Drug Enforcement Administration and officers of the Metropolitan Police Department executed the search warrant for Apartment Two of 13 S Street, Northeast, at about 6:40 p.m.

2. The agents knocked at the door of the apartment and announced their purpose and authority in a loud voice. The agents heard a voice from within the apartment and after waiting two to three minutes the outer door was forced open. The agents again announced their purpose and authority at an inner door. This door was opened by the defendant, Charles W. Ramsey.

3. Charles W. Ramsey was handed a copy of the search warrant and the agents and police commenced a search of the apartment. Ramsey was found to be the only person present in the premises. During the course of the search of the kitchen area of the premises by Agent Grimes, defendant Ramsey's repeated request to enter the kitchen was acquiesced in by Drug Enforcement Administration agents. As a tactical matter, Agent Grimes stood to the side for the purpose of observing, and did observe Ramsey's actions upon entering the kitchen; he observed Ramsey looking around the kitchen area, but particularly noted Ramsey briefly looking upwards at a portion of the ceiling.

Other Drug Enforcement Administration agents and Ramsey thereupon departed the kitchen area; Agent Grimes expanded the area of his search of the kitchen im-

mediately to the previously unsearched ceiling of the kitchen in the location towards which he had observed Ramsey look. The ceiling was so constructed that by exerting a few-pound lifting pressure merely with his hands, Agent Grimes was able to lift free an unfastened tile at that location and he inserted his head and shoulders through the ceiling opening and from that location in the kitchen ceiling, recovered, among other items, two pistols. One was a Colt Trooper Model .357 Magnum, serial number J39598 and the second a Colt Cobra .38 caliber revolver, serial number LW162599. Each gun was transported from the S Street address to the Washington District Office of the Drug Enforcement Administration by Special Agent John Atlee. Once at the District Office, Special Agent Atlee turned the two guns over to Special Agent John Landrum. Special Agent Landrum placed each weapon into a heat-sealed envelope and placed them in a locked metal cabinet.

4. On May 17, 1974, Special Agent John Landrum of the Drug Enforcement Administration and Special Agent Edgar L. Seibert of Alcohol, Tobacco and Firearms of the United States Treasury Department transported the two pistols from the Drug Enforcement Administration District Office to the Metropolitan Police Department Firearms Range. At the Range, Special Agent Seibert test-fired both pistols and found them to be in operable condition. This was done in the presence of Special Agent Landrum. The weapons were returned to the Drug Enforcement Administration District Office.

5. Walter Gleason, Manager of Customer Service, Colt Industries, Firearms Division, Hartford, Connecticut, searched the records maintained by Colt Industries in the normal course of business and those records reflect that a Colt Trooper Mark III .357 Magnum revolver, serial number J39598 on invoice number 094258, was shipped from Hartfort, Connecticut, to the Philips Equipment Company, 525 6th Street, Northwest, Washington, D.C. in September of 1970.

6. Mr. Leonard T. Philips, Manager of the Philips Police Equipment Company, 525 6th Street, Northwest,

Washington, D.C., received from the Colt Manufacturing Company, Hartford, Connecticut, on September 11, 1970, a Colt Trooper Mark III .357 Magnum revolver, serial number J39598. On June 13, 1972, the pistol was sold to William Leak of 1104 21st Street, Northeast, Apartment Nine, Washington, D.C.

7. On June 13, 1972, William Leak of 4009 4th Street, Southeast, Washington, D.C., purchased a .357 Colt Trooper Mark III revolver, serial number J39598, from Philips Police Equipment Company. The pistol was registered with the Metropolitan Police Department on June 26, 1972. On September 10, 1973, the weapon was reported stolen by Mr. Leak to the Metropolitan Police Department.

8. Inez R. Arrendell of 3003 Van Ness Street, Northwest, Apartment W-605, is the sister of the defendant, Charles W. Ramsey. Ms. Arrendell owns the apartment building located at 13 S Street, Northeast, Washington, D.C., but is not at times material to these cases a resident. She allowed her brother the defendant Ramsey, at times material to these cases including specifically February 15, 1974, to reside at the 13 S Street, Northeast, premise and on occasions of visiting the premises had observed her brother's clothing in the apartment numbered Two at 13 S Street, Northeast. Ms. Arrendell disavows any ownership and possession of and all knowledge regarding the above-described pistols seized during the execution of the February 15, 1974, United States Magistrate Search Warrant.

The agents and officers who conducted the search of 13 S Street, Northeast, Apartment Two, on February 15, 1974, observed that the apartment was well furnished and also noticed that the closets only contained expensive male clothing. There was no female clothing stored in the apartment.

In addition to the two pistols described *supra* in paragraph 3 of this subsection, two other hand guns, $1100 in cash and approximately 39 grams gross of marijuana were seized from the kitchen ceiling compartment by Agent Grimes; an additional $1855 in cash was seized from the kitchen stove vent by Agent Grimes and (apart

from in excess of $1200 in cash seized from the person of Ramsey and from personal papers, money and other objects seized elsewhere in the premises) a notebook was found by Agent Grimes in the kitchen. This notebook has been examined by W. A. Shulenberger, a documents analyst of over forty years experience whose expert qualifications are set forth in Section VI(E) of this Record; the expert opinion of Mr. Shulenberg is that the said notebook is in the handwriting of the defendant Ramsey. The pertinent contents of the notebook are set forth in some detail elsewhere in this Record in this Section.

9. Special Agent Edgar Seibert of Alcohol, Tobacco and Firearms of the United States Treasury Department checked the United States District Court for the District of Columbia records and found the records of this Court do reflect that Charles W. Ramsey entered a plea of guilty before Judge George L. Hart, Jr., to Count Two of Criminal Case Number 218-68, a felony violation of the narcotic laws of the United States, that is, a violation of Section 4704(a), Title 26, United States Code.

* * * *

On February 5, 1974, Agents Landrum and Atlee alerted the United States Postal Inspector Richard Hall of the New York Customs seizure of the eight envelopes. A complete description of the envelopes seized—including those in Bangkok, Thailand—was given to Inspector Hall. Subsequently, on February 7, 1974, Inspector Hall notified Agent Atlee of the interception and temporary detaining under controlled conditions at the Main United States Post Office in Washington, D.C. of three brown bulky envelopes addressed to "Continental Printing Company, 1125 "D" Street, N.E." bearing Thai postage; the label "airmail" stamped in red; and measuring six and three quarters inches by four and one-half inches. Inspector Hall further related that approximately thirty envelopes met a description of the above three envelopes had been delivered to Continental Printing Company, 1125 "D" Street, N.E., since December 1973. This information was the result of an interview with Willie Askew, the postal carrier for the address.

On February 7, 1974, Special Agents Landrum and Atlee obtained a United States Magistrate's Search Warrant for the three envelopes intercepted and retained by United States Postal Service at Main Post Office, N. Capitol and Massachusetts Avenue, N.W., Washington, D.C. On the same date, Special Agents Landrum and Atlee, after serving the warrant on Postmaster Simms, Main Post Office, Washington, D.C., searched the envelopes, conducted a field test on the white powder, and received a positive reaction on the Marquis reagent for an opiate drug. Drug Exhibits #3, 4, and 5, addressed to Continental Printing Company, 1125 "D" Street, N.E., were seized pursuant to the warrant. They were transported to the Washington District Office on the same date, stored in a locked cabinet, and delivered to Region 4 Laboratory on February 12, 1974 by Special Agents Landrum and Atlee. On February 13, 1974, Region 4 Laboratory advised Washington District Office that drug Exhibits #3, 4, and 5 contained heroin hydrochloride in the following respective amounts: 92.5%, 75.4% and 84.6%. The containers (drug Exhibits #3A, 4A and 5A, respectively) were transported to the Federal Bureau of Investigation Laboratory on February 26, 1974 for fingerprint analysis.

SUPREME COURT OF THE UNITED STATES

No. 76-167

UNITED STATES, PETITIONER

v.

CHARLES W. RAMSEY and JAMES W. KELLY

ORDER ALLOWING CERTIORARI

Filed October 4, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES OF AMERICA,

Petitioner,

v.

CHARLES W. RAMSEY and
JAMES W. Kelly,

Respondents.

OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
785-3900

Counsel for Respondent
Charles W. Ramsey

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OPINION BELOW

The opinion of the court of appeals is not yet reported and appears at App. A. pp. 1a-20a of the Petition.

JURISDICTION

Jurisdiction of this Court is properly invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether customs officials in exclusive custody and control of the international equivalent of domestic first class letter mail matter, may invade the privacy thereof, upon suspicion that drugs were "possibly" contained therein, without first obtaining a search warrant.

CONSTITUTIONAL PROVISION STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 482, 19 U.S.C. 1582, and the pertinent portions of 19 C.F.R. Part 145 and 39 C.F.R. Part 61 are set out in App. C. pp. 22a-27a of the Petition.

STATEMENT

Charles W. Ramsey and James W. Kelly were long-time friends who, the record reflects, pooled their resources to commence a heroin-by-mail enterprise in the Washington, D.C. area. Essentially, letters containing nearly pure heroin were mailed from Bangkok, Thailand to various locations for distribution.

On January 29, 1974, Bailey and Ward, their suppliers, registered at a hotel in Bangkok and the Thai

authorities were alerted to their arrival by German agents. Twenty-four hour surveillance was then placed on them. During that surveillance, Ward was observed to place letter-size envelopes in six different mail boxes. Five of these envelopes were seized from the mailboxes and among the various addresses thereon was one destined for a Ramsey-Kelly local mail drop. On February 2, 1974, police officers entered Bailey and Ward's hotel room, arrested them, and seized all of the ingredients of their heroin-by-mail operation. Eleven of the sealed heroin filled envelopes seized at that time had Washington, D.C. area addresses which were later tied in to Ramsey and Kelly. On February 4, 1974, the Drug Enforcement Administration in Washington received a cable concerning the recent Thai developments including the arrests of Bailey and Ward.

On that same date and, independent of the knowledge of what had previously transpired, New York based Customs Officer George Kallnischkies routinely seized and opened eight heroin laden envelopes addressed to four D.C. area locations. These envelopes had been mailed by Bailey and Ward in Thailand for eventual delivery to Ramsey and Kelly. The eight envelopes were then placed in a locked container and sent from New York City to Washington, D.C.

As a result of this seizure in New York, Drug Agents here alerted a Postal Inspector on February 5, 1974, of the complete description of the eight envelopes seized and those seized in Bangkok, Thailand. On February 7, 1974, the Postal Inspector notified one of the Drug Agents that three similar envelopes had been intercepted and detained at the Main United States Post Office in Washington, D.C. That same day Agents

Landrum and Atlee obtained a United States Magistrate's Search Warrant for these three envelopes. The envelopes were seized and subsequently determined to contain nearly pure heroin.

On February 12, 1974, the eight letters seized and searched in New York arrived in their locked container and were recovered by Postal Inspector Hall. Then, for the first time, Agents Landrum and Atlee obtained a search warrant for these eight envelopes. On February 14, 1974, six of the eight envelopes were delivered to three addresses contained thereon – two to each location. The two remaining ones were not delivered because of an error in addressing them by Sylvia Bailey to a non-existent address in Washington. James Kelly was then observed on February 14, 1974, in the company of two women, making his rounds to the three surveilled locations and to recover six envelopes which he placed in a brown paper bag. At approximately 1:15 p.m. Kelly drove to the unit block of S Street, N.E. between North Capitol Street and Lincoln Road, parked his car, and walked to 13 S Street, N.E., where Charles W. Ramsey resided. At about the same time, Ramsey was observed to drive slowly past Kelly's car, circle the block and park about a car length in front of Kelly's car. Kelly walked to the driver's side of Ramsey's car and gave the latter the brown paper bag containing the six letters. Agents moved in quickly and made their arrests.

George Kallnischkies (hereafter referred to as Mr. K), testified that he was employed by the United States Custom Service and worked Region 2, New York City. His main responsibility was to examine incoming foreign mail, letter class mail, to see if it contained any dutiable merchandise or contraband. The usual procedure was for the mail in question to come into

Kennedy airport and from there be routed to the various post offices; in the instant case the mail was delivered to the General Post Office.

On Monday, February 4, 1974, Mr. K was working and had occasion to "inspect" letter class mail that had entered this country from other countries. Prior to February 4, 1974, the witness remembered that heroin had been seized from mail coming in from Thailand. Mr. K observed the eight letters which raised his suspicions. He weighed one of the envelopes and found it to weigh 42 grams which he considered rather heavy for an airmail envelope. It also felt as if something was inside of the envelope, not merely plain paper. Accordingly, he opened the envelope via his normal procedure:

> "I usually have a very primitive tool, an ice pick and I just peal (*sic*) the flap open very carefully and remove the contents and examine them . . . ."

Upon opening one of the envelopes herein, he found two pieces of cardboard, and between them, a plastic bag containing heroin. The seven other envelopes appeared similar to him and Mr. K proceeded to open those also and discover heroin in each of them.

The witness stated that no search warrant had been obtained to open the mail in question which he described as airmail letter type envelopes. At the time Mr. K opened the envelopes, he had no prior information about this case nor had he previously noticed the addresses typed on the envelopes for delivery in this country. These particular articles of airmail, had they been mailed within this country would have been considered the equivalent of first class mail.

"Q Now, on the face of each one of these envelopes, did they appear to be so-called letter mail, as you looked at the envelope?

A Yes, sir, these are letters. . . ."

It is clear that the first intrusion into this mail occurred at 1:30 p.m. on Monday, February 4, 1974, and that the items searched could not have arrived at the post office that same day. These eight letter type envelopes arrived at the post office from the airport at the latest on Sunday and at the earliest on Saturday. They were kept there for inspection over the weekend because the customs people did not work on weekends although the post office personnel did. Because of several prior heroin mailings from Thailand, Mr. K was generally suspicious of all mail coming in from that country which probably ranged between "200 or 500 envelopes from" there. On occasions mail would be opened which turned out to contain innocuous material. The particular envelope in question raised a suspicion in his mind:

"Q In other words is it fair to categorize this as intuition or intuitive?

A Yes, sir."

"You know, if you wanted me to be specific, based on my experience, I would say this is Thailand and possibly heroin."

In the course of his daily activities the witness indicated that he probably opened several hundred pieces of mail per day coming in from Thailand and South American countries. The witness could not state with any degree of exactitude what percentage of the mail opened did not contain contraband other than to say, "it does happen, yes."

The cases proceeded to non-jury trial upon the basis of a stipulated record below after various motions raised by the defense were denied by the district court. Upon prior agreement of counsel and the court, twelve of the seventeen drug related counts against Mr. Ramsey in Crim. No. 74-623 were severed and he was adjudged guilty on counts one, two, fourteen, fifteen and seventeen. On February 14, 1975, he was sentenced to concurrent terms of imprisonment for these offenses, the longest of which was 10 to 30 years.

In Crim. No. 74-624 he was adjudged guilty of two firearm's offenses and received lesser terms.[1]

A divided panel of the court of appeals reversed. Judges McGowan and Tamm held that before international letter mail may be opened, a showing of probable cause be made to and a warrant secured from a neutral magistrate. The majority, while recognizing that Postal Regulations include within the term *international letter class mail* items that would clearly be packages, was careful to delimit its definition of the term, for warrant purposes, to that mail matter which common sense tells us are letters. (Petition App. A 9a-10a, n.6) The majority opinion gives full recognition to the border search exception to the warrant procedure when dealing with packages moving through international mail. (Petition App. A. 5a-6a) Judge Robb dissenting, thought that the border search exception extended to sealed envelopes moving in such mail, as had two other Circuit Courts of Appeal that had considered the question.

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[1] These weapons offenses were, concededly, the fruit of the narcotic arrest and these convictions stand or fall with the heroin offenses. Cf. Petition p. 5 n. 6.

REASONS FOR DENYING THE PETITION

In the opening round of its reasons advanced to grant the instant petition, the government raises the spectre that the ruling below may apply to mail entering this country in containers weighing as much as 60 pounds and accordingly, surmises that smuggling will soon run rampant. Petition p. 7 and n. 5. It becomes more certain as the Petition progresses. Petition pp. 11-12. Perhaps this expansive reading of the opinion below is itself cogent reason to deny the relief sought, and await the manner in which that opinion is treated by other courts considering the issue. As we see it, the majority took great pains to indicate that its ruling solely applied to *letters* or *letter-sized* envelopes and not to what one would call a package – viewing the distinction between the two from a common sense angle of vision. In so limiting its rationale, the majority specifically sought to minimize the impact on border searches by confining the search warrant requirement to letters that look like letters and nothing more. Thus, in considering the instant Petition, the Court should view the ruling below as only applying to and seeking to limit unwarranted intrusions into international letter class mail which objectively appears to seek the aegis of the right to privacy.

If that is not readily apparent, then the Court should await future rulings to see whether or not the instant case is – as we contend – to be narrowly construed. In addition to the opinion below being self-limiting, we are not unmindful of the fact that the court had particular envelopes in mind, which were photographed in color and which formed part of the record on appeal. The court alluded to this at n.6 of its slip opinion wherein

it described those envelopes and concluded, that "Government Exhs. 35-40 were in size and appearance closer to the letter end of the spectrum and fell outside of the border search exception." Petition App. A 9a.

To our knowledge, the government has not provided this Court with those exhibits in order that it may be fully informed as to the precise factual matrix presented to the court of appeals. Being fully apprised of these specifics, we cannot take seriously the suggestion in the Petition that the judgment below mandates search warrants based upon probable cause before customs officials may inspect "[b]ulky envelopes and packages arriving from abroad." Petition at 11. From this we are presented with the further bootstrap argument that smuggling will now be both profitable and protected. We submit that, upon careful analysis, the opinion will spawn no such enclave for smugglers.

If Petitioner is in error, and the issue is more narrowly drawn, then we are left with a case that seeks an answer to the question whether this Court, at this point in history, is willing to permit petty government officials armed with ice picks, as was Mr. Kallnischkies, to open the international equivalent of domestic first class letter mail entering this country – without a warrant and upon their suspicions alone. If not, the judgment below should stand and the Petition denied.

Let us make no mistake about the fact that the government is contending for nothing less than the absolute constitutional right to open private letters arriving in this country without a warrant, at random, and without suspicion to believe that they contain contraband or dutiable materials. Petition at pp. 11-12. For that reason, the instant case is unique in that it

does not concern the Fourth Amendment in but its theoretical application to ordinary citizens, but indeed, conjures up that point in history when the populace at large had legitimate fears concerning intrusions into their privacy at the discretion of the crown's messengers.[2]

The government herein contends that at its whim and caprice it can inspect, *inter alia*, the following incoming international mail:

Private correspondence from every American citizen traveling outside of the country who may be writing home, to their jobs, to their doctors, to their lawyers or, to judges – to whom they may be related. Further oppressive examples are legion. Notwithstanding this, the government seeks to console us with the thought that once this correspondence is opened, the customs official is not supposed to read what he finds without first obtaining a warrant. Petition at p. 14. The court of appeals was also aware of this regulation which, it noted, had "no sanction" accompanying it. Slip. op. 12 n. 9. Petition App. A 14a.

In any event, as we see it, the border search exception to the warrant requirement is historically inapposite to the situation at hand.

This Court, over six years ago, allowed a 29 hour detention of first class mail during which time a search warrant could be procured for a seizure. *United States v. Van Leeuwen*, 397 U.S. 249 (1970) The definition of border search sought by the government is not as broad as it may appear at first blush as we read *Carroll v. United States*, 267 U.S. 132 (1925), and other recent cases. *Carroll* sustained the probable cause search of a car without a warrant under the National Prohibition

[2] Recognizing these realities, the government petitioned this Court straightaway without first seeking rehearing *en banc* below.

Act, because of reasonableness. In reflecting upon such searches the Court alluded, *inter alia*, to the progenitor of 19 U.S.C. §482 which:

> "[M]ade lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandize which was subject to duty or had been introduced into the United States in any manner contrary to law. . . .". *Carroll*, supra at 151. The Court alluded to this statute and similar ones –
>
> "To show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." at 153.

The Court also noted that all travellers may be stopped while crossing international boundaries because of national self-protection, "[b]ut those lawfully within the country, entitled to use the public highways, have a right of free passage without interruption of search unless" there is probable cause to believe they are in violation of the law.

The present Border Search authorizing statute is 19 U.S.C., §482. It provides for searches of any "vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in

any manner contrary to law." It also provides for customs agents "to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law." The term "wherever found" however, is as we shall see, quite limited in scope.

It is critical to note that the foundation Border Search statute considered in *Carroll v. United States, supra., i.e.,* 3 Stat. 231, 232, March 3, 1815, distinguished between an ambulatory and permanent situation.

> "And if any of the said officers of the customs shall suspect that any goods, wares, or merchandise, which are subject to duty, or shall have been introduced contrary to law, are concealed in any particular dwelling, store or other building, he shall, upon proper application, on oath, to any judge or justice of the peace, be entitled to a warrant . . . Provided always, that the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, *or to packages on any animal or animals or carried by man on foot."*

It was this original statute the Court alluded to in *Carroll,* supra., when it observed that neither this section "nor any of its earlier counterparts has ever been attacked as unconstitutional." 267 U.S. at 152. 13 Stat. 441, 442, February 28, 1865, which again allowed for the so-called Border Search, provided for the stopping and searching of persons or vehicles *in transit.*

For non-moving situations the statute provided:

> "That in case any store, warehouse, or other building shall be upon or near the boundary line between the United States and any foreign country, and there is reason to believe that [items are placed there in violation of law], and the collector . . . or surveyor of customs, shall make oath before any magistrate . . . , that he has reason to believe, and does believe, that such offence has been therein committed, such officer shall have the right to search such building. . . "

14 Stat. 178 July 18, 1866, for the first time specifically allowed customs officers to search any "trunk or envelope". But it is clear from a reading thereof, that such searches without warrant only applied to trunks or envelopes "on board" vessels or upon vehicles, beasts or persons. The present statute 19 U.S.C., §482 is but an abbreviated form of its predecessors, and from an historical perspective, does not permit for the opening of international mail when there is no danger of that mail moving before a warrant can be obtained. *Cf., United States v. Van Leeuwen,* supra.

Time and time again the key to the validity *vel non* of a particular search is "reasonableness", vis-a-vis the fact that the warrant procedure is the judicially preferred route.

In *United States v. Beckly,* 335 F.2d 86 (6th Circuit 1964) marihuana arrived into this country in a package weighing between 9 and 10 pounds. It was stated to contain wall matts, pillow cases and robes of a total value of $23.00. A customs agent opened the package without warrant and the Court sustained introduction of the evidence at trial. As its first ground the Court relied on the fact that only first class mail is subject to the warrant procedure and here "first class postage was not paid on the package." 335 F.2d at 88. The Court also fashioned a policy that:

> "Fourth Amendment standards applicable to mail matter moving entirely within the country are not applicable to mail matter coming in from outside the country at least where a customs determination must be made. There seem to be no adjudicated cases dealing with the necessity of probable cause and search warrants for inspection of imports by mail, but there are many cases holding or indicating that such is not required generally for searches by custom agents at the borders of the country." Accord, *United States v. Odland*, 502 F.2d 148 (7th Cir. 1974). *United States v. Barclift*, 514 F.2d 1073 (9th Cir. 1975).

These decisions used a shotgun border search approach and extrapolated it to non-moving situations, without analyzing the difference between a true border search and mail matter already within the control of the postal authorities and for which time to obtain a warrant is present. *United States v. Sohnen*, 298 F. Supp. 51 (E.D. N.Y. 1969) sustained a search of an international package without a warrant relying on the *Beckly*, rationale. However, the Court in Sohnen added a caveat:

> "The Constitution at least prevents harsh and demeaning searches on mere suspicion and it may well prevent the opening of letters, as opposed to packages containing merchandise, without a search warrant."

Sohnen, concerned a sealed package containing twelve gold coins which

> "did not bear a required label stating that it could be opened for customs inspection.
>
> * * * *
>
> The situation here is analogous to the inspection of inbound commercial shipments."

United States v. Swede, 326 F. Supp. 533 (S.D.N.Y. 1971), also upheld the opening of first class type mail from Switzerland without a search warrant. In ruling, however, the Court determined that the envelope was a "package" and thus, "we do not determine whether the Constitution prevents the opening of letters, as opposed to packages containing merchandise without a search warrant." However, if a letter is initially involved, a search cannot retroactively transform it into a package because "a search is not to be made legal by what it turns up." *United States v. DiRe*, 332 U.S. 581, 595 (1948).

Recently, lower federal courts have obviously been aware of the havoc that a blanket border search approach to first class international mail would entail, and have accordingly, been narrowing their decisions to exclude letters, as the Court did in *United States v. Swede, supra.* In *United States v. Doe*, 472 F.2d 982 (2d Cir. 1973), for example, the Court upheld the search of a large package from Colombia, South America labelled "old clothing."

> "While this court has never expressly so held, there is a substantial body of precedent that would apply the same border search standards to mail coming into the country, *especially where, as here, there is a representation on the package that it contains merchandise.*" 472 F.2d at 984.

In *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) the Court invalidated the search of a domestic first class parcel containing smuggled watches without a warrant. The government, in part, relied on 19 U.S.C. §482. The Court noted that this was not a broder search and, in any event, concluded that:

"We need not examine the statute's precise meaning, for appellant's attack upon the search of his package is based solely on constitutional grounds and, however it is to be read, the statute could not effectively authorize a search which the constitution prohibited." 367 F.2d at 3.

Cf. Ex Parte Jackson, 96 U.S. 727, 733 (1877).

"No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

"It can hardly be contended that the sender or the addressee had a reasonable expectation of privacy with regard to a large package mailed from a foreign country, which is represented to contain non-dutiable merchandise. Cf. *Katz v. United States,* 389 U.S. 357. . . ". 472 F.2d 985.

Conversely, as to letter type envelopes, such expectation of privacy would be reasonable and accordingly, subject to the Fourth Amendment on the rationale of *Katz.*

In *United States v. Various Articles of Obscene Mer.,* 363 F. Supp. 165 (S.D.N.Y. 1973), the Court noted that "the constraints placed on government intrusion into persons and their papers by the Fourth Amendment do apply to Customs searches." at 167. Judge Duffy also observed that: "Some courts have hinted that the standards may be different when dealing with a letter-sized envelope than when it is a package with merchandise which is at issue."

This distinction between letters and packages is, no doubt, due in large part to subjective appraisals of

privacy. While all of us have a general notion that large packages can be inspected by postal employees, we strongly believe that our letters and small sealed envelope type of correspondence is beyond postal scrutiny. We abhor notions of censorship such as that practiced in totalitarian countries or prisons. *Cf. Stroud v. United States,* 251 U.S. 15, 21 (1919). (No expectation of privacy for letters mailed by inmate at Leavenworth penitentiary.) Accordingly, there is a firmly grounded reasonable expectation that this envelope type of mail is secure from intrusion. As a result thereof, only the warrant procedure of the Fourth Amendment could effect a lawful seizure. *Katz v. United States* 389 U.S. 347 (1967).

We thus conclude – for the purposes of this case – that international letter type mail coming into this country which is functionally equivalent to domestic first class mail is not subject to governmental intrusion without a search warrant, unless that mail is upon a person or his luggage entering the country. We believe this to be the proper historical angle of vision from which to read 19 U.S.C. §482. The so-called border search concept is an offshoot of the *necessity* to act quickly to preserve our territory and customs duties at a time when an individual and/or his belongings entering the country could rapidly disappear. No such justification exists herein, when the mail was in the custody and control of the postal authorities and the agents had ample time to apply for a search warrant.

To reiterate, this view is strongly supported by *Katz v. United States, supra,* which greatly changed notions of privacy under the Fourth Amendment. When any of us cross international boundaries we expect and readily submit to customs inspections of our persons and

belongings – a cognizable consequence of such travel. When we write to people in foreign lands we expect an answer and, vice versa, because letters are, of necessity, unilateral documents requiring further correspondence as a rule. It is unreasonable to assume in this shrinking world that the law only protects one side of this flow of communication from unreasonable searches and seizures. It is untenable to think otherwise than that all parties to the communication process, especially those receiving letters in America, have a reasonable expectation of privacy as to their mail. *Cf.* 18 U.S.C. §1702.

Finally, as a reason for the granting of its petition, the government points to an undesirable "conflict among the circuits" which was engendered by the opinion below. Petition p. 9. While such a conflict appears to exist, it may well be that re-examination of the issue by the various Courts of Appeal will bring us the harmony sought by the government. If, as we contend, the opinion below was correct, other courts could realign their thinking in the matter upon consideration of that opinion. Furthermore, at page 9, n. 9 of its Petition, the government has given us some extra-record insight into an ongoing administrative procedure which might obviate the problem it sees. We are advised that the Postal Service has notified the Customs Service that it will not turn over for customs inspection mail bound for the District of Columbia unless the Bureau complies with the procedures required by the court below.

We are further informed that the government has been informed by the Customs Service that it cannot meet these procedures with the current level of personnel. However, hope for the future is not ruled out, because we are also told that compliance would be

impractical even with an expanded staff. While, in our experience, nothing takes the place of live testimony subject to rigorous examination to develop a precise factual record, taken at its obscure best, we can infer from this extra-record material, that compliance will be achieved in the future – albeit with some difficulty. We have great confidence that the government will not let this mail matter slip through its hands for long without some sort of monitoring system which will comply with the ruling below.[3] Therefore, compliance at the administrative level may soon forestall the need for further review by this Court. At the very least, we suggest that the Court await the outcome of further administrative proceedings to be more fully explored in future cases upon an adequate record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ALLAN M. PALMER
1707 N. St., N.W.
Washington, D.C. 20036

September 1976.

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[3] Judges McGowan and Tamm – quite concerned with the problem of smuggling – were particularly careful to articulate how the Customs Service could readily comply with the search warrant requirement as applied to that limited class of mail matter with which the opinion dealt. Cf. Petition App. A, 8a-10a.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

UNITED STATES OF AMERICA	:	
	:	
Petitioner	:	
	:	
v.	:	No. 76-167
	:	
CHARLES W. RAMSEY and JAMES W. KELLY	:	
	:	
Respondents	:	
	:	

BRIEF OF RESPONDENT JAMES W. KELLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Irving R. M. Panzer
1735 DeSales Street, N. W.
Washington, D. C. 20036

(Appointed by the United States Court of Appeals, District of Columbia Circuit, under the Criminal Justice Act)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

UNITED STATES OF AMERICA Petitioner v. CHARLES W. RAMSEY and JAMES W. KELLY Respondents	:	No. 76-167

BRIEF OF RESPONDENT JAMES W. KELLY
IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI

Respondent Kelly accepts the Question Presented, the Statement of the Case, and the other formal portions of the petition for a writ of certiorari, and proceeds to the body of his Opposition.

REASONS FOR DENYING THE WRIT

1. There is no square conflict.

The first (and obviously the major) reason advanced by the Government for granting the writ is that there is a conflict of circuits and that the court below "acknowledged that it was creating a conflict among the circuits" (Petition, p. 9). Indeed the majority of the Court of Appeals did believe its decision was in square conflict with the Seventh Circuit and the Ninth Circuit, see App. A, p. 6a, as did the dissenting judge, see App. A, p. 20a, but analysis of the cited decisions shows, surprisingly, that while a superficial conflict does exist, none of the cases cited by the Court of Appeals can be said to be in square conflict with the decision below.

The decision below not only held that a warrantless search of international letter mail violated the Fourth Amendment (and to that extent there is indeed a conflict with the Seventh and Ninth Circuits), but it also brought in the First Amendment as an important factor, since communication is involved. It is the conjunction of these two Constitutional mandates that gives the decision below its unique nature, unique because none of the allegedly conflicting decisions touches this point. And none of those decisions devoted, to the basic issue, the careful and scholarly attention that was invested by the Court below.

Indeed, of the cases cited (by both the majority and the minority below) as being in square conflict,[1] only one, United States v. Odland, 502 F. 2d 148, even purported to deal at any length with the issue raised here. In Odland, the Seventh Circuit did not deal with 19 U.S.C. 482 as did the court below (see Pet. App. A, p. 13a) but did sustain under 39 CFR 61.1 a search, without a warrant and without probable cause, of mail originating outside the United States.[2] The Seventh Circuit expressly held that the confidentiality of mail is guaranteed only to first class mail (that is, domestic mail), 502 F. 2d at 150, citing 39 U.S.C. 3623(d). The Seventh Circuit dealt only superficially with the Fourth Amendment and did not mention the First Amendment at all. And in its other cited decision, United States v. Bolin, 514 U.S. 554 (1975), the Seventh Circuit in sustaining a warrantless search of international mail did no more

1/ United States v. Bolin, 514 F. 2d 554 (7th Cir., 1975); United States v. Odland, 502 F. 2d 148 (7th Cir., 1974), cert. den., 419 U.S. 1088; United States v. Barclift, 514 F. 2d 1073 (9th Cir., 1975), cert. den. 423 U.S. 842.

2/ 39 CFR 61.1, printed at Pet. App. A, pp. 24a-25a, provides: "All mail originating outside the customs territory of the United States is subject to customs examination" (with the exception of diplomatic or official mail. The regulation is an implementation of 19 U.S.C. 1582 (printed at Pet. App. A, p. 22a, which provides: "The Secretary of the Treasury may prescribe regulations for the search of persons and baggage..."

than cite the Odland decision, without again reviewing the law.

The Ninth Circuit, in a per curiam decision in United States v. Barclift, 514 F. 2d 1073 (1975), sustained a warrantless search of international mail on only the briefest of discussions, basing its decision neither on 19 U.S.C. 482 nor 39 CFR 61.1; instead, the Ninth Circuit rested its holding on 19 CFR 145.2 (printed at Pet. App. A, p. 23a),[3/] and cited the Odland decision with approval. (The Ninth Circuit appears to believe - incorrectly - that the Odland opinion also relied upon 19 C.F.R. 145.2)

No mention was made of the First Amendment; indeed, the entire discussion of the search issue is shockingly short (three paragraphs on pp. 1074-5).

There thus is no agreement among the circuits upon exactly what statute or regulation is involved, the court below not having mentioned either of the two regulations relied upon by the Seventh and Ninth Circuits, and it cannot be said that there is a square conflict of circuits.

2. The decision below should be given time to make its influence felt.

The thoroughness and persuasiveness of the decision below is such (especially as compared to the brief, almost cryptic, discussions of the Seventh and Ninth Circuits) that it seems an excellent possibility that the opinion below will influence all future decisions and thereby obviate any conflict, making it unnecessary for this

3/ 19 C.F.R. 145.2 is almost a duplicate of 39 C.F.R. 61.1. It provides: "All mail originating outside the Customs territory of the United States, whether sealed or unsealed, is subject to Customs examination, except" (and the exceptions are diplomatic or official mail).

Court to devote its time to this matter. The Court should deny the writ at this point and allow a reasonable period of time to see whether the conflict, if there is one, disappears.

Despite the efforts of the Government to make it appear that the decision below has created a crisis for the Customs Service, a cool appraisal of the facts indicates that no critical problem exists. Given the fact that this Court has sustained the authority of Government officials to delay first class mail for a period of at least 29 hours while they investigated suspicious circumstances and then obtained a search warrant, United States v. Van Leeuwen, 397 U.S. 249 (1970), a unanimous decision, the solution is clear. The Customs officials could collect any suspicious international letter mail, take the appropriate time to present it properly to a magistrate, and obtain a warrant.[4/] Certainly the impressive testimony of the Customs Inspector in this case would virtually guarantee the issuance of a warrant, thereby obviating the confrontation that the Government appears to have forced. There is no necessity to have a confrontation or to have this Court decide the issue at this very moment.

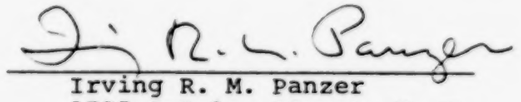
One of the chief factors influencing the denial of the issuance of the writ in this case should be the impact of the First Amendment on the warrant requirement of the Fourth Amendment in cases involving letter mail, an impact which (as we have said) was totally ignored by the other courts. The decision of the court below was so clearly correct and so impressive on this point

4/ As was pointed out below by the Court of Appeals, Pet. App. 17a, this is precisely what the authorities in Washington, D.C., did when similar envelopes arrived at the Washington Post Office. The procedure appears to have caused the authorities no particular problem.

that we confidently expect it to have great influence on other federal appellate courts; we expect to see its rationale adopted. We think this Court should give the decision its opportunity to circulate among other courts and to make its weight felt. As the court below pointed out in the portion of its opinion dealing with First Amendment considerations, Pet. App. 11a-14a:

> "Finally, and probably most important, letter mail is a vital means of communication in our society. Letters express the most important and sensitive of our personal, familial, political, professional, and financial affairs. They implicate both our deepest privacy and our interest in free expression, far more than packages or suitcases or automobiles. In the words of Justice Holmes, 'the use of the mails is almost as much a part of free speech as the right to use our tongues.' United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J. dissenting), quoted with approval in Blount v. Rizzi, 400 U.S. 410, 416 (1971), and United States v. Van Leeuwen, supra, at 251.
>
> Even if the ordinary practice of the Customs Service is not to read the mail that is opened, see note 9 infra, mere knowledge on the part of individuals of the practice of routinely opening mail inhibits the exercise of free speech. See Procunier v. Martinez, 416 U.S. 396, 423 (1972) (Marshall, Jr., concurring); cf. Talley v. California, 362 U.S. 60, 65 (1960); NAACP v. Alabama, 357 U.S. 449, 462 (1958). And the Supreme Court has indicated that limits on search and seizure must be especially strong where First and Fourth Amendment values converge. See, e.g. United States v. United States District Court, supra, at 313-14; Stanford v. Texas, 379 U.S. 476, 485 (1965).
>
> The Court has also noted, with reference to the need to enforce Fourth Amendment protections, that '[h]istory abundantly documents the tendency of Government - however benevolent and benign its motives - to view with suspicion those who most fervently dispute its policies.' 407 U.S. at 314. The recent disclosures about the widespread illegal searches of mail by United States intelligence agencies, see e.g., REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES [THE ROCKEFELLER COMMISSION], June 1975, at 101-15, 168; S. REP. No. 755, 94th Cong., 2d Sess., Book II, at 12, 17, 38, 62, 107-08 (1976); id., Book 3, at 559-677; Hearings before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess. Vol 2, at 1-2, 15-16, 51-63, 66, 76 (1975); id., Vol. 4, at 2,4,6-7, 10-11, 21-22, 31-35, 38, 43, 148, 150, 163; id., Vol. 6, at 202-06, 367, highlight the importance of the Supreme Court's observation. The Supreme Court has also stated, as one reason supporting its requirement that warrants be obtained for electronic surveillance related to the domestic aspects of national security, that '[b]y no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.' United States v. United States District Court, supra, at 321. Routine opening of international mail presents the same threat to First Amendment interests, and enforcing the protections of the Fourth Amendment can provide law-abiding citizens with the same important assurance.
>
> It thus appears that there is not a sufficient need, and there is too great a risk to personal privacy, to extend the border search exception to permit unrestrained opening of international mail. We believe that the values protected by the First and Fourth Amendments demand that, before international letter mail is opened, a showing of probable cause be made to and a warrant secured from a neutral magistrate. "

It is unnecessary for this Court to devote its attention to this matter at this time. The petition for a writ of certiorari should be denied.



Irving R. M. Panzer
1735 DeSales Street, N. W.
Washington, D. C. 20036
Telephone: 783-3391

(Appointed by the U.S. Court of Appeals, District of Columbia Circuit)

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No. 76-167

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES W. RAMSEY AND JAMES W. KELLY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
JEROME M. FEIT,
ANN T. WALLACE
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES W. RAMSEY AND JAMES W. KELLY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 538 F. 2d 415.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on June 10, 1976. On July 1, 1976, the Chief Justice extended the time within which to file a petition for a writ of certiorari to August 9, 1976. The petition was filed on August 5, 1976, and was granted on October 4, 1976 (A. 82). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether probable cause and a search warrant are required before customs officials may open an envelope entering the United States from abroad, when they suspect that the envelope contains smuggled goods.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 482, 19 U.S.C. 1582, and the pertinent portions of 19 C.F.R. Part 145 and 39 C.F.R. Part 61 (1975) are set out in Appendix A, *infra,* at pages 1A–5A.[1]

STATEMENT

In November 1973 Sylvia Bailey and William Ward, then residing in West Germany, were principals in an international narcotics trafficking operation

[1] 39 C.F.R. Part 61, in effect at the time of the search in this case, has been superseded by U.S.P.S. Pub. 42, Part 820, incorporated at 39 C.F.R. Part 10, 41 Fed. Reg. 35683–35684 (1976), which makes no substantive change.

(Pet. App. 2a–3a). West German agents intercepted several trans-Atlantic telephone conversations between Bailey and respondent Ramsey during which the narcotics operation was discussed (*id.* at 3a).

In late January 1974 Bailey and Ward moved the base of their operation to Thailand (Pet. App. 3a). Thai officials, alerted by West German authorities, saw them mailing numerous envelopes (*ibid.*). Five envelopes were inspected by Thai officials; one of the addresses was linked to respondents (*ibid.*). On February 2, 1974, Thai officials arrested Bailey and Ward and seized numerous envelopes containing heroin. Eleven of the envelopes bore Washington, D.C. addresses connected to respondents (*ibid.*).

Two days later George Kallnischkies, a customs officer in New York City who was unaware of these events, detected undeclared matter in eight envelopes en route from Thailand to four addresses in Washington, D.C. (A. 30–31). These envelopes were "rather bulky," and officer Kallnischkies believed that they contained merchandise rather than correspondence (A. 31, 32, 42, 53). He weighed one of them and found that it was three times the ordinary weight of an airmail letter (A. 31, 47). He opened this envelope and found, between two pieces of cardboard, a plastic bag containing a white substance that he believed to be heroin. The envelope contained no correspondence. Based upon this discovery, he opened the other seven bulky envelopes, which appeared to have been addressed on the same typewriter as was the first en-

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velope; these envelopes also contained heroin (A. 32, 42, 56, 61–62).

The envelopes were resealed, and six of them were delivered to three addresses (A. 67–74).[2] Federal agents saw respondent Kelly collect the envelopes, rendezvous with respondent Ramsey, and give Ramsey a brown paper bag (A. 70–72). Respondents were then arrested. The bag contained the six envelopes of heroin, $1,100 in cash, and material with which to dilute the heroin (A. 72–73). Additional evidence was discovered pursuant to search warrants for several residences (A. 74–80).

Respondents were indicted for numerous offenses arising out of this transaction (A. 9–15). They moved to suppress the heroin that had been discovered by officer Kallnischkies.[3] After an evidentiary hearing, the district court denied the motion from the bench (A.

[2] After officer Kallnischkies had opened the envelopes, they were sent to Washington in a locked pouch; they were opened in Washington by agents of the Drug Enforcement Administration, who removed most of the heroin before making the delivery to respondents. The agents obtained a search warrant before opening the envelopes (A. 5, 60). This was an exceptional procedure; warrants are not obtained to open the mail in the first instance (A. 33, 43), and a post-opening warrant obviously does not justify the original opening. Nothing in the record of this case indicates why the agents obtained the warrant. It is possible, however, that they did so because they feared that the second opening might be viewed as an inland search to which the border search rules would not apply. At all events, the obtaining of a post-opening warrant in this case does not indicate anything about the constitutionality of the initial warrantless opening or the feasibility of requiring pre-opening warrants.

[3] It is not clear why respondents have standing to object to officer Kallnischkies' opening of the envelopes. The envelopes were not addressed to them and contained no correspondence. The government did not contend below that respondents lack standing, however, and we therefore have not presented it as a question for resolution by this Court. See *United States* v. *Santana*, No. 75–19, decided June 24, 1976, slip op. 3 n. 2.

54). Respondents then waived their right to a jury trial, and the case was submitted on the basis of stipulated facts and exhibits. On December 20, 1974, the district court found respondents guilty of unlawful importation of heroin and of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a) and 952(a). The court also found respondent Kelly guilty on one count, and respondent Ramsey guilty on three counts, of the unlawful use of a communication facility, in violation of 21 U.S.C. 843(b). Finally, the court found respondent Ramsey guilty of two firearms offenses.[4] Respondent Ramsey was sentenced to concurrent terms of imprisonment, the longest of which was 10 to 30 years. Respondent Kelly was sentenced to partially concurrent and partially consecutive terms aggregating 10 to 30 years' imprisonment.

A divided panel of the court of appeals reversed on all counts. Although it found officer Kallnischkies' seizure of the envelopes reasonable, it held that the envelopes could not be opened without probable cause and a warrant. The court acknowledged that border

[4] These offenses—receiving and possessing a firearm as a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1), and receiving and possessing a pistol, in violation of 22 D.C. Code 3203—were the subject to a separate indictment. The weapons were found as a result of respondents' arrests and so are "fruit" of the discovery of the heroin. The convictions consequently must stand or fall with the heroin offenses.

searches have traditionally been recognized as an exception to the warrant requirement of the Fourth Amendment (Pet. App. 5a–7a). It thought, however, that this exception was justified only by the exigencies attendant upon other kinds of border searches (*id.* at 7a); finding no exigencies compelling officer Kallnischkies to act without a warrant, the court concluded that he could not do so.

The court distinguished between letter mail envelopes and mail packages, indicating that warrantless searches of the latter would be allowed with or without exigent circumstances.[5] The court advanced four reasons for this distinction. First, only "limited kinds of contraband * * * can be concealed within a letter-sized envelope," so that it is less likely that an envelope, "rather than an automobile or a suitcase, contains contraband" (Pet. App. 8a). Second, the court thought that officials using metal detectors, X-rays, and trained dogs could detect items smuggled in envelopes (*ibid.*). Third, envelopes can be detained more readily than travellers while a warrant is being obtained (*id.* at 10a). Finally, the court thought that warrantless openings of envelopes would inhibit freedom of expression (*id.* at 11a–13a).

Judge Robb dissented. He would have followed the uniform decisions of other courts of appeals that have allowed warrantless inspections of envelopes at the

[5] The court of appeals limited its holding to international letter class mail, and it did not require probable cause or a warrant to open other classes of mail on which less postage is paid. See Pet. App. 9a–10a n. 6.

border (Pet. App. 19a–20a). In his view, the historical justification for border searches is sufficient to allow the opening of an envelope. He also questioned the consistency of the majority's position: observing that the majority would allow searches of people and packages, he argued that a package or envelope should not acquire greater security against inspection simply because it is smaller or is not carried by a person.

SUMMARY OF ARGUMENT

The judgment of Congress, embodied in longstanding statutes, is that border searches without probable cause or warrants are essential to detect dutiable items and contraband as they enter the country. Approximately one billion envelopes enter the United States from abroad each year. Many of these envelopes are large, stiff or bulky, and they conceal their contents as well as does a cardboard box. Unless customs officers have authority to open the envelopes, they will become hiding places for smuggled goods of all sorts.

The judgment of Congress is entitled to a strong presumption of constitutionality. This is especially so here, because border searches have been accepted for more than 200 years. In 1882 this Court upheld a seizure from an envelope entering the United States (*Cotzhausen* v. *Nazro*, 107 U.S. 215), and since then the right of customs inspectors to open parcels at the border has not been seriously questioned. The Court has continued to indicate in considered *dicta* that such searches are consistent with the Fourth Amendment.

The power to inspect things entering this country has not been confined to goods travelling with their owner; the first customs statute authorized the seizure of goods arriving by ship in much the same way small parcels today arrive by mail. Nor would there be any logic in such a distinction. Bulky envelopes arriving at the border may contain counterfeit money, microfilm, jewels, precious metals, drugs, or many other things either barred from entry or subject to duty.

Bulky envelopes, like larger containers, rarely announce that they contain contraband, and customs officers rarely know enough about them to have even a fair idea of their contents. To require probable cause as a condition of inspection therefore would be to guarantee success to resourceful smugglers.

The difficulties in developing probable cause are magnified by the enormous quantities of mail entering this country. More than one billion envelopes arrive each year; it is not possible to subject each one to the scrutiny necessary to ascertain its contents with precision. Even devices such as magnetometers and X-ray machines cannot detect heroin; although trained dogs sometimes can detect marijuana, odors can be masked, and dogs usually cannot smell substances (such as heroin) that have only faint odors. In fiscal 1976 customs officers opened approximately 270,000 envelopes (less than 0.03% of the total), of which approximately 48,000 contained dutiable or prohibited items, which is more than three envelopes containing dutiable or prohibited items per officer per working day. In order to find these en-

velopes, each officer opens approximately 19 envelopes per working day, sorting them from the approximately 1,900 whose exteriors he inspects. If probable cause and a warrant were required for each opening, the inspection process would grind to a halt.

Perhaps a requirement of probable cause might be justified if it were necessary to protect important privacy interests. But the opening of a bulky envelope at the border can fairly be characterized as a minimal intrusion in an area where there has traditionally been little expectation of privacy. It is certainly less of an intrusion than the detailed personal inspection to which international travelers are routinely exposed. Why should the greater intrusion be allowed and the lesser intrusion be banned?

The court of appeals evidently was most concerned with a supposed "chilling effect" that openings of envelopes might have upon the expression of ideas. Although we do not question the legitimacy of concern about any practice involving warrantless reading of mail, 19 C.F.R. 145.3 already provides that no correspondence may be read without a warrant. There is no evidence in the record of this case that customs officers disregard this rule. Moreover, any person desiring to guard against the opening of his international correspondence can do so by sending envelopes that are not so large and bulky that they give rise to suspicion that they contain something other than correspondence; there has been no claim in this case that customs officers open such envelopes. In any event, respondents have not argued that they were exposed to any chilling effect; the envelopes involved

here contained no correspondence. The concerns articulated by the court of appeals would justify, at most, a rule that correspondence seized from the mails without a warrant, and any "fruits" derived from reading such correspondence, may not be admitted into evidence. There is no need to fashion a broader exclusionary rule.

ARGUMENT

NEITHER PROBABLE CAUSE NOR A WARRANT IS NECESSARY BEFORE OPENING AN ENVELOPE AS IT ENTERS THE UNITED STATES FROM ABROAD IN THE MAIL

A. INTRODUCTION

This case involves the opening by a Customs Service officer of envelopes mailed into this country from abroad. In opening the envelopes, which he suspected contained something other than or in addition to correspondence, the officer was acting pursuant to authority granted by a statute enacted in 1866 that explcitly allows customs searches of "envelopes" (see 19 U.S.C. 482, App. A, *infra,* p. 1A) and pursuant to postal and customs regulations implementing that statute (App. A, *infra,* pp. 1A–5A). The officer was proceeding in conformity with the decisions of every court, save the court of appeals in this case, that has considered the problem.[6] His actions were unquestion-

[6] See *United States* v. *Doe*, 472 F. 2d 982, 984–985 (C.A. 2) (*dictum*), certiorari denied *sub nom. Rodriquez* v. *United States*, 411 U.S. 969; *United States* v. *Milroy*, 538 F. 2d 1033 (C.A. 4), certiorari denied, June 7, 1976 (No. 75–6479); *United States* v. *King*, 517 F. 2d 350, 352–353 (C.A. 5); *United States* v. *Henritze*, 522 F. 2d 1279 (C.A. 5), certiorari denied, 424 U.S. 966; *United States* v. *Beckley*, 335 F. 2d 86, 88–89 (C.A. 6) (*dictum*), certiorari denied *sub nom. Stone* v. *United States*, 380 U.S. 922; *United States* v. *Bolin*, 514 F. 2d 554 (C.A. 7); *United States* v. *Odland*, 502 F. 2d 148, 151 (C.A. 7), certiorari denied, 419 U.S. 1088; *United States* v. *Barclift*, 514 F. 2d 1073, 1074–1075 (C.A. 9), certiorari denied, 423 U.S. 842; *United States* v. *Swede*, 326 F. Supp. 533, 536 (S.D. N.Y.). The First Circuit recently upheld a border search of a package without probable cause or a warrant, but it reserved the question of the search of an envelope. *United States* v. *Emery*, C.A. 1, No. 75–1420, decided September 24, 1976, slip op. 3.

ably proper under the traditional approach to border searches.

It may be helpful to begin by pointing out what this case does not involve. It does not involve the opening of domestic mail. It does not present the difficult problem of defining the geographic limits of border searches, and it does not require the Court to consider whether some inland area is the "functional equivalent" of the border; in this case the search took place at a post office as the mail was entering the United States, the very point where border search authority must be exercised if it is to be meaningful. This case does not present any question concerning the standard of conduct established by the Fourth Amendment for especially intrusive searches at the border, such as visual inspections of the body ("strip searches") and intrusions into the body itself ("body cavity searches").[7] The search here involved an in-

[7] The law with respect to such searches is instructive, however. Customs officials are entitled to make intrusive searches without a warrant upon real or reasonable suspicion (for strip searches) or a clear indication of wrongdoing (body cavity searches). See, *e.g.*, *United States* v. *Cameron*, 538 F. 2d 254 (C.A. 9) (collecting cases).

spection of a package, not of a person. No one was exposed to indignity or delay. The sole question presented is whether it is "reasonable," within the meaning of the Fourth Amendment, for a customs officer, having before him an envelope that he has reasonable cause to suspect contains something other than correspondence, to open that envelope without antecedent judicial approval.

We submit that the search here is justified by the single fact that the officer knew that the envelope was entering the United States from abroad. Nothing else—not suspicion, not probable cause, and not antecedent judicial approval—is constitutionally necessary.[8] That is the judgment of Congress embodied in longstanding statutes that condition the entry of things into this country upon exposure to the routine searches necessary to detect the importation of prohibited or dutiable items. This long history, and the judgment of Congress, are entitled to considerable deference. *United States* v. *Watson,* 423 U.S. 411, 416; *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 75–76. Border searches stand upon their unique historical and practical footing rather than, as the

[8] A number of lower courts have confirmed the authority of customs officials to search items brought into the country "on subjective suspicion alone, or even on a random basis." See, *e.g.*, *United States* v. *Stornini*, 443 F. 2d 833, 835 (C.A. 1), certiorari denied, 404 U.S. 861; *United States* v. *Soria*, 519 F. 2d 1060, 1063 (C.A. 5); *United States* v. *Diaz*, 503 F. 2d 1025, 1026–1027 (C.A. 3); *United States* v. *Brown*, 499 F. 2d 829, 833 (C.A. 7), certiorari denied, 419 U.S. 1047.

court of appeals supposed, upon exigent circumstances in particular cases.

We think that the rationale for border searches of persons and their effects applies with full force to border searches of envelopes. It would be strange indeed if envelopes were entitled to greater protection than people. What this Court said in 1882 is no less true today (*Cotzhausen* v. *Nazro,* 107 U.S. 215, 218):

> Of what avail would it be that every passenger, citizen and foreigner * * * is compelled to sign a declaration before landing, either that his trunks and satchels in hand contain nothing liable to duty, or if they do, to state what it is, and even the person may be subjected to a rigid examination, if the mail is to be left unwatched, and all its sealed contents * * * are to be exempt from seizure, though laces, jewels, and other dutiable matter of great value may thus be introduced from foreign countries.

If, as is universally agreed, "even the person may be subjected to a rigid examination" at the border, it must follow that effects entering the United States separately, whether in trunks, in parcels, or in envelopes, are subject to examination.

B. BORDER SEARCHES ON LESS THAN PROBABLE CAUSE ARE AN ACCEPTED PART OF OUR CONSTITUTIONAL HERITAGE

1. Border searches occupy a unique status in our law. As the Court observed in *Boyd* v. *United States,* 116 U.S. 616, 623, "the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid duties payable on them, has been authorized by Eng-

lish statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government" (footnote omitted). A statute enacted by the same Congress that proposed the Bill of Rights provided that customs officials had "full power and authority" to search vessels for smuggled goods.[9] Ever since, border searches without probable cause or a warrant have been an unquestioned part of the system of detecting smuggling. See generally Note, *From Bags to Body Cavities: The Law of Border Search,* 74 Colum. L. Rev. 53 (1974); Barnett, *A Report on Search and Seizure at the Border,* 1 Am. Crim. L.Q. no. 4, p. 36 (1963).

Clauses 1 and 3 of Article I, Section 8 of the Constitution grant Congress the power to regulate com-

[9] The first customs statute (Section 24 of Act of July 31, 1789, 1 Stat. 29, 43) was enacted approximately two months prior to the proposal of the Bill of Rights to the state legislatures on September 25, 1789 (1 Stat. 97). Sections 23 and 24 provided in part:

"Sec. 23. * * * [I]t shall be lawful for the collector, or other officer of the customs, after entry made of any goods, wares or merchandise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof * * *.

"Sec. 24. * * * [E]very collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise."

Section 24 differentiated between the cause needed to search a vessel for dutiable goods and the cause needed to search a "dwelling-house, store, [or] building" on land where it was suspected that smuggled goods had been placed. In the latter case, a warrant was required; in the former, mere suspicion was sufficient.

merce with foreign nations and to lay and collect duties. Because the power thus granted includes the power to "exclude merchandise at [Congress'] discretion" (*Brolan* v. *United States,* 236 U.S. 216, 219; *Weber* v. *Freed,* 239 U.S. 325, 329), it also includes the power to condition the entry of all things into the country upon exposure to the routine, suspicionless inspections necessary to prevent the importation of prohibited things.

Cotzhausen v. *Nazro, supra,* this Court's first border search case, involved a seizure of a shawl from a package sent through the mails. The seizure was made under Section 3061 of the Revised Statutes, which is the source of 19 U.S.C. 482, upon which we rely here.[10] The Court upheld the search and seizure, remarking that the statutes "authorize and direct the seizure of any property imported contrary to law; and the officer is to open *envelopes* for that purpose, and, on reasonable ground to believe it subject to duty or to have been unlawfully imported, he shall seize and secure the same for trial" (107 U.S. at 219; emphasis added).

The right of customs officials to open parcels at the border has never since been seriously questioned. The Court has continued to endorse such searches in considered *dicta,* and no Justice has expressed doubts about their constitutionality. The Court wrote in *Boyd* v. *United States, supra,* 116 U.S. at 623, that searches

[10] The search in this case also was authorized by 19 U.S.C. 1582 (App. A, *infra*, p. 1A) and implementing regulations. Cf. 19 U.S.C. 1498(a)(1) and 1499.

at the border for smuggled goods "are totally different things" from inland searches.

In *Carroll* v. *United States,* 267 U.S. 132, the Court considered the warrantless stop and search of an automobile for bootleg liquor. It held that such searches could be conducted without a warrant, but that they required probable cause. It carefully distinguished border searches, however (267 U.S. at 153–154):

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search * * *.

More recent cases demonstrate that border searches continue to be accepted. *United States* v. *Thirty-seven Photographs,* 402 U.S. 363, involved an opening of luggage at the border and the seizure of allegedly obscene materials. The Court remarked (*id.* at 376): "[A] port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials * * *. Customs officers characteristically inspect

luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country."

The same theme was sounded in *United States* v. *12 200-Ft. Reels of Super 8mm. Film,* 413 U.S. 123, 125, in which the Court again upheld a seizure of obscene materials at the border, writing: "Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. * * * Historically such broad powers [to search] have been necessary to prevent smuggling and to prevent prohibited articles from entry." The Court recognized that the mails were a particularly vulnerable path of entry: "[A] large volume of obscene material on microfilm could rather easily be smuggled into the United States by mail" (*id.* at 129).

In the recent cases involving inland searches near the border, the Court repeatedly has recognized that border searches themselves stand on a different footing, and that neither probable cause nor a warrant is necessary for a search at the border itself. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 272 (opinion of the Court), 288 (opinion of White, J.); *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 884 (opinion of the Court), 887 (opinion of Rehnquist, J.); *United States* v. *Martinez-Fuerte,* No. 74–1560, decided July 6, 1976; see also *California Bankers Association* v *Shultz,* 416 U.S. 21, 62–63.

The power to inspect people and goods upon entry into this country has not been limited to goods travelling with their owner; the first customs statute authorized the seizure and inspection of goods arriving by ship [11] in much the same way small packages today arrive by mail. Nor would there be any logic to such a limitation. Bulky envelopes arriving at the border may contain money, microfilm, jewels, precious metals, drugs, and many other things either barred from entry or subjected to duty. To close such envelopes to customs officials would be to create a broad highway over which smugglers such as respondents could ply their trade.

2. The customs procedures with respect to mail have evolved differently from the customs procedures with respect to importations by other means, and it may be helpful to trace that evolution briefly. 19 U.S.C. 482 is the recodification of Rev. Stat. § 3061, an amended version of the very first customs statute. Section 482 provides that a customs officer may "search any trunk or envelope, wherever found, in which he may have reasonable cause to suspect there is merchandise which was imported contrary to law * * *." This is now implemented by 19 C.F.R. 145.2, which authorizes customs officials to open all mail originating outside the customs territory, with exceptions for diplomatic mail.

Customs officials have not always used the full powers conferred by statute, however. Until approximately 100 years ago, the international letter mail system was

[11] See note 9, *supra*.

devoted primarily to the transmission of correspondence, and merchandise was sent by freight or parcel post. The Post Office began as an establishment solely for the "communication of intelligence by letter, newspaper or pamphlet" (5 J.C.C. 719 (1776); 21 J.C.C. 670 (1782)).[12] Merchandise or other non-written material was not generally admitted to the domestic mails until 1863. See 12 Stat. 704; 17 Stat. 301. Until 1924 it was generally forbidden to introduce dutiable articles into the international letter mails. The Court observed in *Cotzhausen* v. *Nazro, supra,* 107 U.S. at 217–218, not only that the importer had neglected to pay duty on the shawl, but also that the sender had

[12] During these earliest years customs officials had little role to play with respect to letters arriving from abroad. The federal government did not yet levy duties on imports, and the major role of customs officials was ensuring that letters were delivered to postmasters by the officers of incoming vessels; the vessels were not allowed to carry mail themselves from one port to another except under contract with the Post Office. The Continental Congress provided in this regard (16 J.C.C. 413 (1780)):

"That all masters of packets and other vessels in continental service be, and they are hereby, required to lodge whatever letters they bring from abroad, in the post office nearest to the port where they arrive, and immediately after their arrival."

Approximately two years later, Congress proscribed the opening of letters (other than "dead mail") by postal employees (23 J.C.C. 673–674 (1782)).

These postal ordinances were given effect by the First Congress. 1 Stat. 70. The Second Congress enacted postal legislation requiring the delivery of letters on board vessels to the postmaster at the port of entry (1 Stat. 235–236). In 1852 customs collectors were authorized to "carefully search every vessel for letters." 10 Stat. 140. These duties apparently included nothing more than assisting in enforcing the postal laws.

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posted it in the mails in violation of a treaty excluding dutiable articles from the mails.

Smuggling by parcel post packages had been a problem much earlier, however. In 1866 Congress enacted Rev. Stat. § 3061 (now 19 U.S.C. 482), which authorized customs officials to open "envelopes" for inspection. This authority was used to open unsealed or parcel post envelopes; it was not immediately used to open sealed letter mail. The first regulation outlining the agreement between postal and customs authorities to cooperate in the performance of their duties was promulgated in 1871; it provided that customs officials could open any package arriving from abroad without probable cause or a warrant, but that letter mail would be opened only by authority of the addressee. Customs officials could require the addressee to come to the post office and open the letter in their presence. 1873 Postal Laws and Regulations ("P.L. & R.") § 52.[12a]

This system was effective as long as international conventions continued to prohibit the use of letter mail to carry dutiable articles, and as long as senders generally respected that ban. In 1924, however, the Universal Postal Convention was modified to permit the insertion of certain dutiable articles into international letter mail. Universal Postal Convention ("UPC"), Stockholm, August 28, 1924, Art. 34, Section 9; Art. 41, Section 1(d), 44 Stat. 2238, 2241.[13]

[12a] See also 1879 P.L. & R. § 1133; 1887 P.L. & R. § 621; 1893 P.L. & R. § 579; 1902 P.L. & R. § 696.

[13] From 1874 to 1924 the multilateral postal convention had prohibited the insertion of dutiable articles into letter post items. International Postal Treaty, Berne, October 9, 1874, protocol Art. 25, 19 Stat. 604; UPC, Paris, June 1, 1878, Art. 11, 20 Stat. 740–741; The Additional Act of Lisbon, March 21, 1885, Art. 8, 25 Stat. 1344; UPC, Vienna, July 4, 1891, Art. 16–3, 28 Stat. 1088–1089; UPC, Washington, June 15, 1897, Art. 16–3, 30 Stat. 1641–1642; UPC, Rome, May 26, 1906, Art. 16–3–2°(b), 35 Stat. 1656–1657; UPC, Madrid, November 30, 1920, Art. 18–2(d), 42 Stat. 1991–1992. See *Cotzhausen* v. *Nazro*, *supra*, 107 U.S. at 217–218.

In order to alleviate potential problems of smuggling or avoidance of duty, the Convention authorized postal administrations to require the sender to complete and attach to the envelope a "'green label," a form declaring the nature and value of the contents. See 44 Stat. 2279–2280. Attachment of a "green label" amounted to a consent to search (44 Stat. 2238), and the Post Office promulgated regulations authorizing the opening of "green label" mail by customs officials."[14]

When incoming letter mail apparently containing merchandise lacked a "green label," customs and postal officials arranged for a delivery to the addressee at the post office but declined to turn over the mail until opening had been authorized.[15] Letter mail was not opened by customs officials acting alone until 1971.

The restraint with which customs officials had exercised their authority under 19 U.S.C. 482 was attrib-

[14] See 1924 P.L. & R. § 632, ¶¶ 3, 9(a); 1940 P.L. & R. §§ 2229–2230; 1948 P.L. & R. Part 116; 39 C.F.R. 116.8(a), 116.12(c) (1949); 39 C.F.R. 161.1 (1955); 39 C.F.R. 132.1(a) (1959); 39 C.F.R. 151.3(a) (1962); 39 C.F.R. 262.1 (1968).

[15] See note 14, *supra*. A violation of these regulations by customs officials was not, however, considered to be a ground to suppress any evidence discovered during a search. See *United States* v. *Sohnen*, 298 F. Supp. 51, 53 (E.D. N.Y.); *United States* v. *Swede*, *supra*.

utable in part to concern, shared by postal authorities, that unilateral searches of non-"green label" items would violate the Convention [16] and in part to the fact that the old procedures usually had been a satisfactory way to gain access to envelopes requiring inspection. Moreover, so long as customs officials were enforcing tariff regulations rather than absolute prohibitions on entry, addressees were usually willing to cooperate with the procedures.[17] But the volume of international letter mail has expanded dramatically in recent years, and smugglers do not attach "green labels" to their mail. Attempts to obtain the addressee's consent to search, or the making of a "controlled delivery" (such as was done in this case), require substantial investments of time by postal and customs employees, investments that are worthwhile only when customs officials are almost certain that the envelope contains contraband. Too, attempts to obtain addressee consent create a substantial risk of alerting the smugglers and allowing them to flee.

In 1970 the Post Office and Treasury Department therefore jointly proposed changes in the postal and customs regulations to allow the opening of non-"green label" envelopes that were believed to contain dutiable or prohibited matter. 35 Fed. Reg. 2410–2411. The Treasury Department stated (*id.* at 2410):

[16] The Convention now explicitly allows the opening of any envelope at the border. UPC, Vienna, 1964, Art. 30, 16 U.S.T. 1348 (1965); UPC, Tokyo, 1969, Art. 31, 22 U.S.T. 1099 (1971); UPC, Lausanne, 1974, Art. 34.

[17] Addressees usually were willing to authorize openings and pay duty to receive valuable articles; they obviously would be far less likely to authorize openings to search for contraband.

> The long recognized authority of the Bureau of Customs to open sealed letters arriving in the international mail has been inhibited by the presence of [certain postal] regulations which generally provide that a sealed letter of foreign origin believed to contain prohibited or dutiable matter shall be returned unopened to its origin unless the addressee authorizes the opening of the letter.

The practice of not searching non-"green label" mail except with consent made smuggling too easy: the sender would fail to attach a "green label" to the envelope, which would often be delivered unsuspectingly; if, however, customs officials suspected that the letter contained contraband, and requested the addressee's consent to search, the addressee would be alerted and could refuse delivery. The new regulations, which allow customs inspectors to open envelopes when they suspect they contain matter other than correspondence, alleviate that problem and allow more efficient use of scarce customs resources.

Some members of Congress objected to the new regulations (116 Cong. Rec. 13862–13864 (1970)), but efforts to prohibit the change were defeated.[18] The

[18] A proposed amendment was defeated on the floor of the House. 116 Cong. Rec. 20482–20483 (1970). In the Senate, a committee held hearings on a bill (S. 3613, 91st Cong., 2d Sess. (1970)) that would have required a warrant for the opening of any envelope. Hearings on S. 3613 before the Senate Committee on Post Office and Civil Service, 91st Cong., 2d Sess. (1970). The Committee reported a bill that required a warrant only for sealed domestic mail. After a conference Congress adopted the Senate suggestion, which become 39 U.S.C. 3623(d). See H.R. Conf. Rep. No. 91-1363, 91st Cong., 2d Sess. 88 (1970).

new regulation became effective on July 22, 1971. 36 Fed. Reg. 11850–11851. It represents an application to envelopes of the same power customs officials always have exercised over parcels, trunks, and persons. It should be upheld in light of that history. See *United States* v. *Watson, supra.*

C. IMPORTANT LAW ENFORCEMENT INTERESTS JUSTIFY THE MINIMAL INTRUSION INVOLVED IN OPENING AN ENVELOPE RECEIVED FROM ABROAD, EVEN IN THE ABSENCE OF PROBABLE CAUSE

In our view the history and long constitutional acceptance of border searches is sufficient to support the search that took place in this case. But we need not stand upon history alone, since compelling practical considerations render the practice constitutionally reasonable. These considerations have been recognized by the American Law Institute, which has endorsed border searches. The *Model Code of Pre-arraignment Procedure* § SS 260.2(1)(d) (1975) provides that customs officials should be able to search without a warrant "personal effects, and packages and other containers of whatever description," as they enter the United States. Section SS 260.2(2) provides that reasonable cause is not required to undertake such searches. The commentary to the *Model Code* (*id.* at pp. 546–550) concludes that border searchers are justified by practical necessity as well as by history.

The Customs Service faces staggering difficulties in searching for dutiable articles and contraband in incoming mail. The Customs Service informs us that during each of fiscal years 1975 and 1976 more than

one billion envelopes and 42 million packages entered the United States from abroad.[19] Most of these envelopes and packages are not accompanied by any declaration of their contents, and the fact that they are arriving from abroad prevents customs inspectors from having even a fair idea as to what they may contain. Many of the envelopes are large, bulky and stiff, and they conceal their contents as well as does a cardboard box. Unless customs officials have authority to inspect these envelopes, they will become hiding places for smuggled goods of all sorts. To require probable cause as a condition of inspection would be to guarantee success to resourceful smugglers.

The Customs Service has augmented its staff of 62 officers assigned to inspection of envelopes with trained dogs and an X-ray machine.[20] Regrettably, these tools are of limited value in detecting contraband. Dogs can smell contraband only if it gives off discernible odors; although marijuana has such an odor (if it is not masked), jewelry, counterfeit currency, pornography, and many other dutiable and prohibited items do not. The odor of heroin is exceedingly faint, and it can be masked. Although an X-ray machine can detect metals and other dense objects, it cannot detect drugs and microfilm. At best, the customs inspectors can isolate those envelopes that are likely to contain objects other than correspondence.

[19] "Envelopes," in the sense used in this brief, refers to all envelope-shaped mail of any postage rate, and not simply mail moving at international letter class rates.

[20] Twenty customs facilities use trained dogs.

Whether those envelopes contain dutiable material, contraband, non-dutiable matter, or simply cardboard usually must be determined by a visual inspection.

The Customs Service informs us that in fiscal 1975 and again in fiscal 1976 the Postal Service referred for screening approximately 27 million envelopes (about one-fortieth of the envelopes entering the United States in each of those years). [21] The Customs Service estimates that in each of those years its inspectors opened for visual inspection approximately 270,000 pieces of mail, or one of every 100 examined. Many of these openings were supported only by suspicion; the total openings represented approximately one of every 4,000 envelopes arriving from abroad.

Of the approximately 270,000 pieces of mail opened each year, the Customs Service informs us, it found undeclared dutiable materials in approximately 27,000. Duty was assessed on these items before delivery. The Customs Service also found 18,000 envelopes containing prohibited items in fiscal 1975 and over 21,000 envelopes containing prohibited items in fiscal 1976.[22]

[21] Postal officials refer to the Customs Service mail appearing to contain something other than correspondence; they also refer all mail coming from certain countries, such as Thailand and Colombia, that are notorious sources of contraband. See also A. 39.

[22] See Appendix B, *infra*, p. 7A, which sets out a description of the prohibited items found and seized. This table counts only one item per envelope, but some contained more than one. With 62 officers examining 27,000,000 envelopes yearly, and assuming 230 working days each year, each office must scrutinize almost 1,900 envelopes daily, or 240 each hour. Each officer opens approximately 19 envelopes daily and finds approximately 3.3 containing prohibited or dutiable items.

The discoveries of prohibited items in envelopes dwarfed the discoveries in packages: only 748 prohibited items were found in packages in fiscal 1975, and only 915 in fiscal 1976.

These data suggest that envelopes are an attractive medium for smugglers. Despite the fact that the Customs Service found dutiable or prohibited matter in almost one-fifth of the envelopes it opened in the last two fiscal years, great quantities of such items continue to be sent by mail. A requirement that customs officers have probable cause before opening an envelope would cripple the inspection program and greatly facilitate smuggling. In this area, searches on suspicion amounting to less than probable cause are essential to "maintaining any kind of credible deterrent" (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 293 (White, J., dissenting)).

The court of appeals suggested that it would take a flexible view of probable cause (Pet. App. 13a–14a n. 8). It is hard to know what to make of this statement. If the court meant that it would be enough to have probable cause to believe that something other than correspondence is in an envelope, the court's decision not only denigrates the concept of probable cause but also is unresponsive to any real problem of government misconduct: customs officers do not open envelopes unless they have reason to believe that they contain things in addition to correspondence. But if—as seems likely in light of its suggestion that cus-

toms officers make use of trained dogs, X-ray machines, metal detectors, and the like—the court meant to require something more, then its decision would preclude effective interception of contraband at the border. None of the techniques the court of appeals mentioned can distinguish a copy of a book by Jane Austin from a book of hard-core pornography; none can distinguish a toy watch from a real one, or a jewel from a piece of glass.

Perhaps a requirement of probable cause might be justified if it were necessary to protect important privacy interests. But the opening of an envelope at the border, when the officers have reason to believe that it contains things other than or in addition to correspondence, can fairly be characterized as a "minimal" intrusion. *United States* v. *Martinez-Fuerte, supra,* slip op. 15. It is certainly less of an intrusion than the detailed personal inspection to which international travelers are exposed routinely. It does not expose any person to indignity or delay. It does not invade any area in which the individual has a legitimate expectation of privacy; it is well known that things crossing the border are subject to inspection, and no one could reasonably expect that bulky and opaque envelopes will escape some form of scrutiny. The pressing needs of law enforcement, balanced against the interests of privacy, as in *Martinez-Fuerte,* lead inescapably to a conclusion that searches of envelopes at the border are reasonable.

The court of appeals advanced several reasons for a contrary conclusion, but none withstands analysis.

The court thought that searches of envelopes are less "exigent" than searches of people, because people are more mobile (Pet. App. 10a). This does not explain, however, why searches of trunks and baggage and parcels are permitted, and it does not account for the unique historical footing of border searches. The court thought that envelopes are less likely than packages to be used to carry contraband (Pet. App. 8a). That is simply wrong. Perhaps because senders are certain that parcels will be inspected but know that many envelopes will escape inspection, international letter class mail is preferred to packages as a place to conceal contraband (see App. B, *infra,* p. 7A). The court apparently thought that dogs, metal detectors, and other devices could detect contraband more readily when the contraband is in envelopes than when it is in packages (Pet. App. 8a); there is no support for this speculation, and at a minimum it is unproven.

The court of appeals was most concerned, however, with the "chilling effect" that openings of envelopes may have upon the expression of ideas. Although we do not doubt that the privacy interest in domestic communication by first class mail is sufficient to require probable cause and a warrant before an envelope can be opened,[23] that requirement ought not to be extended to envelopes entering the country in letter class mail. Several reasons, in addition to the historic differences

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[23] See *Ex parte Jackson*, 96 U.S. 727; *United States* v. *Van Leeuwen*, 397 U.S. 249. Cf. *Katz* v. *United States*, 389 U.S. 347 (domestic wire communications).

between border and inland searches, support this argument.[24]

First, any person who desires to guard against the reading of international correspondence has a simple expedient: he can send envelopes that are not so large or bulky that they give rise to suspicion that they contain something other than correspondence. There has been no showing in this case that customs inspectors open such envelopes. Second, 19 C.F.R. 145.3 provides that no correspondence may be read without a warrant. See also 18 U.S.C. 1702. There has been no claim in this case that correspondence has been read or censored by customs officers. Third, although many envelopes contain personal correspondence, many others do not. Conversely, many packages or parcels contain correspondence. The court of appeals would allow searches of parcels containing correspondence; it should follow that searches of envelopes that appear to contain merchandise should be permitted.

The court of appeals analyzed this case as if international correspondence were regularly read or censored by customs officers (Pet. App. 11a, 13a). The data provided by the Customs Service shows that fewer than one in 4,000 envelopes is opened, however, and there is no evidence in the record of this case demonstrating that the Customs Service violates its regulation forbidding the reading of letters. There is

[24] In fact, the international exchange of ideas does not stand on an equal footing with the domestic exchange of ideas. See *Kleindienst* v. *Mandel*, 408 U.S. 753, 762–770.

no practice of routinely opening without a warrant envelopes that appear to contain only correspondence.

In any event, respondents have not argued that *their* correspondence was read, nor could they, for the envelopes contained no correspondence. Whatever inhibitory effect customs inspections may have on others, respondents were not exposed to it.[25] The concerns articulated by the court of appeals would justify, at most, a rule that correspondence seized without warrant or probable cause from international mails, and "fruits" derived from a reading of such correspondence, may not be admitted into evidence. There is no need to fashion a broader exclusionary rule and to exclude contraband discovered in bulky

[25] Such an effect is not different in kind from that attending the inspection of envelopes entering a prison. "The possibility that contraband will be enclosed in letters" is sufficient to allow prison officials to open *all* envelopes. *Wolff* v. *McDonnell*, 418 U.S. 539, 577. The Court considered and rejected as cumbersome and unworkable a proposal by the court of appeals in that case (remarkably like the proposal of the court of appeals here) that prison officials use sophisticated detection techniques and verify the contents of suspicious envelopes by communicating with the sender. In *Wolff* the envelopes ultimately were opened in the prisoner's presence; customs inspectors do not open envelopes in the addressee's presence. We submit, however, that this should not call for a different result, at least in the absence of some demonstration that customs inspectors are abusing their authority. Obviously the practicality of having the addressee present is far greater in a prison than in the international mail context. Moreover, in cases such as the instant one, providing for the presence of the addressee when opening the envelope would drastically subvert the prospects for successful prosecution when a crime is involved to which the addressee is a party.

envelopes.[26] Exclusionary rules are in derogation of the search for truth in a criminal case; they should not sweep more broadly than is necessary to achieve the deterrence thought to be desirable. Cf. *United States* v. *Janis*, No. 74–958, decided July 6, 1976.

[26] Even if, despite existing legal prohibitions, there were occasional instances of the reading of correspondence by individual customs officers acting out of malicious curiosity, it seems unlikely that the court of appeals' procedures would be effective in eliminating such meddling; a Customs Service employee who reads international correspondence does so for personal reasons, not out of any expectation that incriminating material will be found and that a criminal prosecution will follow. Because reading of international correspondence is not motivated by a desire to secure a criminal conviction, suppression of evidence in a criminal case (in which, indeed, no correspondence has been read) could not deter the conduct. Suppression would penalize customs officials who engage in legitimate activities—the discovery and seizure of contraband—while leaving customs officials who improperly read correspondence unaffected. What is more, there is no reason to suppose that a requirement of a warrant would overcome any tendency that now exists on the part of Customs Service employees to read international correspondence; if these employees are (by assumption) willing to ignore present prohibitions (18 U.S.C. 1702 and 19 C.F.R. 145.3), they also would be willing to ignore a requirement of probable cause and a warrant. If, on the other hand, customs officials adhere to 19 C.F.R. 145.3, a requirement of probable cause and a warrant would not add appreciably to the protections accorded international correspondence.

Much the same argument applies to concerns about the possible reading of international correpondence by national security agencies of the federal government. To the extent these agencies may read international correspondence, they do not do so with any expectation of discovering evidence to be introduced in a criminal prosecution; an exclusionary rule therefore would not deter their conduct. Nor would they be affected by any requirement directed to the legitimate activities of the Customs Service.

D. A WARRANT IS NOT REQUIRED TO OPEN AN ENVELOPE AT THE BORDER

The court of appeals, having concluded that searches of envelopes entering this country from abroad must be based on particularized suspicion about the contents of an envelope amounting to some form of "probable cause," invalidated the search in this case because, it held, a search of the contents of such envelopes is lawful only if a search warrant has been obtained. We submit that—whatever may be said about the need of some kind of particularized suspicion to support the constitutional reasonableness of opening envelopes from abroad at the border—the Fourth Amendment does not require that search warrants be obtained in advance of such openings.

In the preceding discussion we have demonstrated that both history and compelling exigencies attending the enforcement of the customs laws dictate that customs authorities be permitted to open envelopes such as those involved in the instant case without any particularized suspicion that any given envelope contains dutiable items or contraband, and certainly without suspicion amounting to probable cause. If that is so, it follows directly that the privacy interests at stake are not the kind that should receive the protection of a warrant requirement; warrants, after all, may be issued only upon a showing of probable cause, under the express terms of the Fourth Amendment.[27]

[27] The court of appeals thought that there was probable cause to open the envelopes in this case (Pet. App. 13a n. 8). We hesitate to take issue with that conclusion, although the information known

What is more, because it has always been understood that enclosed containers entering this country from abroad may be opened without probable cause, neither the addressee nor the sender of a bulky envelope has a reasonable expectation of privacy in its interior. See *Katz* v. *United States*, 389 U.S. 347, 353. In the absence of such a reasonable expectation of privacy, the usual foundation for requiring a warrant is absent.The court of appeals thought otherwise, relying on *Camara* v. *Municipal Court*, 387 U.S. 523 (see Pet. App. 7a n. 5). *Camara*, however, is "not * * * an apt model. It involved the search of private residences, for which a warrant traditionally has been required." *United States* v. *Martinez-Fuerte*, *supra*, slip op. 21. The opening of envelopes and the search for dutiable goods and contraband involved in the customs practice does not present the sort of dangers against which a warrant is designed to protect. This case does not involve "a search or seizure carried out on a suspect's premises" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 474 (plurality opinion)); it involves, instead, a search of an enclosure in which

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to the officer (that the envelope was bulky and from a country notorious as a source of contraband) seemingly would not be sufficient to authorize an inland search. But however that may be, the court's conclusion that there was probable cause on these facts does not buttress its conclusion that a warrant was required. If officer Kallnischkies could have opened the envelopes on mere suspicion without a warrant, the fact that his suspicion in this case was strong enough to amount to probable cause (and thus to enable him to obtain a valid warrant) would not compel him to seek antecedent judicial approval that is unnecessary when suspicion is weaker.

there has traditionally been little or no expectation of privacy. Far from falling within the rule that searches are presumptively unreasonable without a warrant, the search here falls within the oldest exception to a warrant requirement.

We also believe that the court of appeals' warrant requirement is entirely impractical. Customs officials who must scrutinize an average of 1,900 envelopes daily, and who now open an average of 19 envelopes daily, could not find time to draw up 19 applications for warrants without dramatically decreasing their ability to inspect the mail. The enormous volume of international mail makes individual warrants impossible; neither the Customs Service nor the federal courts could cope with a requirement that approximately 270,000 warrants be issued each year, each with an affidavit "particularly describing the place to be searched, and the persons or things to be seized."

Perhaps the court of appeals envisaged streamlined procedures under which customs officials would present larger quantities of mail to a magistrate at one time for some kind of group warrant. But this, too, would hinder effective use of the time of the officials to search for smuggling, while at the same time depriving the warrant procedure of the means of affording any realistic antecedent judicial scrutiny. If the Customs Service simply presented a bag full of mail to a magistrate and represented that each piece required inspection, the magistrate could not effectively make a detached judgment whether the opening of

particular envelopes was appropriate; if, on the other hand, customs personnel attempted to provide the magistrate with a detailed description of each envelope, and the attributes of that envelope that made opening appropriate, the process would be nearly as cumbersome as obtaining a separate warrant for each envelope.

The Warrant Clause of the Fourth Amendment trol over massive and routine administrative searches simply was not designed as a method of judicial con- such as border searches. The Fourth Amendment's requirement of "reasonableness" does not depend, in these circumstances, upon antecedent judicial approval. The search here was reasonable because it took place at the border as part of a longstanding administrative program of searches. The activities of the customs officers are a matter of routine; to the extent there is any question about the reasonableness of particular border searches, these questions can be examined in subsequent judicial proceedings no less well than the activities of the Border Patrol that were upheld in *Martinez-Fuerte*.

Moreover, the opening of an envelope at the border is no more intrusive, and no more in need of antecedent judicial approval, than is the search of a package at the border, which the court recognized does not require a warrant. It is far less intrusive than the search of a person entering the United States. As Judge Robb remarked in dissent in this case (Pet. App. 19a), "that the contents to be inspected are enclosed in an envelope, rather than by wrapping

paper and twine, cannot be of critical significance." We submit that the decision of the court of appeals stands the Fourth Amendment on its head by requiring greater cause and more judicial scrutiny to make the less intrusive search. The court of appeals' approach—making border searches stand on exigent circumstances in particular cases—rides roughshod over 200 years of history and erects an unworkable requirement that does little or nothing to enhance the safeguards afforded to recipients of international mail.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
JEROME M. FEIT,
ANN T. WALLACE,
Attorneys.

NOVEMBER 1976.

APPENDIX A

1. Section 3 of the Act of July 18, 1866, 14 Stat. 178, Rev. Stat. § 3061, 19 U.S.C. 482, provides in relevant part:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine * * * any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; * * *.

2. Section 582 of the Act of June 17, 1930, 46 Stat. 784, 19 U.S.C. 1582, provides in relevant part:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage * * *; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

3. 19 C.F.R. Part 145 provides in relevant part:

* * * * *

§ 145.1 Definitions.

The following are general definitions for the purposes of part 145:

(a) *Mail.* "Mail" or "international mail" means both Postal Union mail and parcel post, as those terms are construed in 39 CFR Part 12.

(b) *Letter mail.* "Letter mail" means letters and letter packages in Postal Union mail.

(c) *Package.* "Package" means any parcel, packet, envelope, or other similar container, whether sealed or unsealed, arriving in the international mail.

§ 145.2 Mail subject to Customs examination.

All mail originating outside the Customs territory of the United States, whether sealed or unsealed, is subject to Customs examination, except:

(a) Mail known or believed to contain only official documents addressed to officials of the U.S. Government;

(b) Mail addressed to Ambassadors and Ministers (Chiefs of Diplomatic Missions) of foreign countries; and

(c) Letter mail known or believed to contain only correspondence or documents addressed to diplomatic missions or the officers thereof, or to international organizations designated by the President as public international organizations pursuant to the International Organizations Act (see § 148.87(b) of this chapter). Mail, other than letter mail, addressed to such designated international organizations is subject to Customs examination except where the organization certifies under its official seal that such mail contains no dutiable or prohibted articles. Any Customs examination made shall, upon request of the addressee international organization, take place in the presence of an appropriate representative of that organization.

§ 145.3 Reading of correspondence prohibited.

No Customs officer or employee shall read or authorize or allow any other person to read any

correspondence contained in sealed letter mail of foreign origin unless a search warrant has been obtained in advance from an appropriate judge or U.S. magistrate which authorizes such action.

§ 145.4 Dutiable merchandise without declaration or invoice, prohibited merchandise, and merchandise imported contrary to law.

(a) *Subject to seizure and forfeiture.* When, upon Customs examination, a package from abroad is found to contain merchandise subject to duty or tax, and the package is not accompanied by an appropriate Customs declaration and invoice or statement of value required by § 145.11, or is found to contain material prohibited importation or imported contrary to law, the merchandise is subject to seizure and forfeiture.

* * * * *

4. 39 C.F.R. Part 61 provides in relevant part:

§ 61.1 What is subject to examination.

All mail originating outside the customs territory of the United States is subject to customs examination, except (a) mail addressed to Ambassadors and Ministers (Chiefs of Diplomatic Missions) of foreign countries, (b) letter mail known or believed to contain only correspondence or documents addressed to diplomatic missions or the officers thereof, or international organizations designated by the President as public international organizations pursuant to the International Organizations Immunities Act, and other mail addressed to such international organizations pursuant to instructions issued by the Department of the Treasury, and (c) mail known or believed to contain only official documents addressed to officials of the U.S. Government.

§ 61.2 Separation points.

(a) *Exchange offices.* Mail believed to contain matter liable to customs duty or believed to contain prohibited matter is submitted immediately to local customs officers, except when exchange offices are authorized to redispatch such mail to designated distribution offices for customs treatment thereat. Exchange offices which redispatch matter to be submitted to customs officers will attach Tag 10 (previously Label 81), a reusable pink slotted tag, bearing the words, "This sack contains mail Supposed Liable to Customs Duty," to the label holders or hasps of sacks or pouches.

(b) *Distribution offices.* Distribution offices will submit such mail to customs officers as soon as possible after receipt. The reusable tags, Tag 10, removed from sacks containing this mail will be returned periodically to the postmasters at New York, New Orleans, San Francisco, Seattle, or Miami, as may be appropriate from a geographical standpoint.

(c) *Priority treatment of airmail.* Airmail articles receive preferential customs treatment and are submitted to customs separately from surface mail. Upon return from customs, dispatch will be by air if it will expedite delivery.

§ 61.3 Examination.

(a) *Registered mail.* The postmaster or other designated postal employee must be present when registered articles and registered parcels are opened by customs officers for examination. After customs treatment, the customs officer will repack and reseal the articles and parcels.

* * * * *

(c) *Failure to receive customs treatment.* Should an article known or supposed to be dutiable be observed at or en route to the office of address without having received customs treatment, forward it, labeled "For Customs Inspection," under cover to U.S. Customs Office at the nearest office listed in § 61.3(d), except that if registered matter is involved send to the Postmaster of the city where the customs office is located so the mail may be handled in accordance with § 61.3(a). Packages that have received customs treatment will bear an endorsement such as "Passed Free U.S, Customs" or the red adhesive U.S. Customs Service envelope that contains Customs Mail Entry, Form 3419. The U.S. Customs Service does not endorse "Passed Free of Duty" on printed matter (magazines, newspapers, circulars, and books). If printed matter is dutiable it will bear the red adhesive envelope that contains Customs Mail Entry, Form 3419.

* * * * *

APPENDIX B

SEIZURES FOR CUSTOMS VIOLATIONS [1]

Violations	Letter mail		Parcel mail	
	1975	1976	1975	1976
Weapons	0	1	20	35
Cocaine	496	644	31	24
Drug Paraphernalia	0	0	5	3
Hashish	1, 902	3, 600	231	153
Heroin	72	148	2	18
LSD	0	3	0	1
Marijuana	1, 242	1, 526	222	274
Other Dangerous Drugs	39	90	15	85
Opium	3	9	6	6
Switch Blade Knives	0	1	66	114
Morphine	0	0	0	2
Pornography	[2] 14, 250	[2] 15, 300	[2] 150	[2] 200
Totals	18, 004	21, 322	748	915

[1] Source: Information supplied by the Customs Service. Each seizure reflects contraband found in a single envelope or package, which may contain more than one prohibited item.

[2] Estimate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES OF AMERICA,

Petitioner,

v.

CHARLES W. RAMSEY and
JAMES W. KELLY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CHARLES W. RAMSEY

ALLAN M. PALMER
1707 N St., N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Respondent
CHARLES W. RAMSEY

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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BRIEF FOR RESPONDENT CHARLES W. RAMSEY

QUESTION PRESENTED

Whether customs officials in exclusive custody and control of the international equivalent of domestic first class letter mail matter may invade the privacy thereof, upon suspicion that drugs were "possibly" contained therein, without first securing a search warrant.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 482, 19 U.S.C. 1582, and the pertinent portions of 19 C.F.R. Part 145 and 39 C.F.R. Part 61 (1975) set out in Appendix A, at pages 1A-5A of the brief for Petitioner.

STATEMENT

Charles W. Ramsey and James W. Kelly were long-time friends who, the record reflects, pooled their resources to commence a heroin-by-mail enterprise in the Washington, D.C. area. Essentially, letters containing nearly pure heroin were mailed from Bangkok, Thailand to various locations for distribution.

On January 29, 1974, Bailey and Ward, their suppliers, registered at a hotel in Bangkok and the Thai authorities were alerted to their arrival by German agents. Twenty-four hour surveillance was then placed on them. During that surveillance, Ward was observed to place letter-size envelopes in six different mail boxes. Five of these envelopes were seized from the mailboxes and among the various addresses thereon was one destined for a Ramsey-Kelly local mail drop. On February 2, 1974, police officers entered Bailey and

Ward's hotel room, arrested them, and seized all of the ingredients of their heroin-by-mail operation. Eleven of the sealed heroin filled envelopes seized at that time had Washington, D.C. area addresses which were later tied in to Ramsey and Kelly. On February 4, 1974, the Drug Enforcement Administration in Washington received a cable concerning the recent Thai developments including the arrests of Bailey and Ward. (A. 3, 56)

On that same date and, independent of the knowledge of what had previously transpired, New York based Customs Officer George Kallnischkies routinely seized and opened eight heroin laden envelopes addressed to four D.C. area locations. These envelopes had been mailed by Bailey and Ward in Thailand for eventual delivery to Ramsey and Kelly. The eight envelopes were then placed in a locked container and sent from New York City to Washington, D.C. (A.57)

As a result of this seizure in New York, Drug Agents here alerted a Postal Inspector on February 5, 1974, of the complete description of the eight envelopes seized and those seized in Bangkok, Thailand. On February 7, 1974, the Postal Inspector notified one of the Drug Agents that three similar envelopes had been intercepted and detained at the Main United States Post Office in Washington, D.C. That same day Agents Landrum and Atlee obtained a United States Magistrate's Search Warrant for these three envelopes. The envelopes were seized and subsequently determined to contain nearly pure heroin. (A. 59-60)

On February 12, 1974, the eight letters seized and searched in New York arrived in their locked container and were recovered by Postal Inspector Hall. Then, for the first time, Agents Landrum and Atlee obtained a search warrant for these eight envelopes. On February 14, 1974, six of the eight envelopes were delivered to three addresses contained thereon – two to each location. The two remaining ones were not delivered

because of an error in addressing them by Sylvia Bailey to a non-existent address in Washington. James Kelly was then observed on February 14, 1974, in the company of two women, making his rounds to the three surveilled locations and to recover six envelopes which he placed in a brown paper bag. At approximately 1:15 p.m. Kelly drove to the unit block of S Street, N.E. between North Capitol Street and Lincoln Road, parked his car, and walked to 13 S Street, N.E., where Charles W. Ramsey resided. At about the same time, Ramsey was observed to drive slowly past Kelly's car, circle the block and park about a car length in front of Kelly's car. Kelly walked to the driver's side of Ramsey's car and gave the latter the brown paper bag containing the six letters. Agents moved in quickly and made their arrests. (A. 56-74)

George Kallnischkies testified that he was employed by the United States Custom Service and worked Region 2, New York City. His main responsibility was to examine incoming foreign mail, letter class mail, to see if it contained any dutiable merchandise or contraband. The usual procedure was for the mail in question to come into Kennedy airport and from there be routed to the various post offices; in the instant case the mail was delivered to the General Post Office.

On Monday, February 4, 1974, Mr. Kallnischkies was working and had occasion to "inspect" letter class mail that had entered this country from other countries. Prior to February 4, 1974, the witness remembered that heroin had been seized from mail coming in from Thailand. He observed the eight letters which raised his suspicions and weighed one of the envelopes and found it to weigh 42 grams which he considered rather heavy for an airmail envelope. It also felt as if something was inside of the envelope, not merely plain paper. Accordingly, he opened the envelope via his normal procedure:

> "I usually have a very primitive tool, an ice pick and I just peal (*sic*) the flap open very carefully and remove the contents and examine them . . . ."

Upon opening one of the envelopes herein, he found two pieces of cardboard, and between them, a plastic bag containing heroin. The seven other envelopes appeared similar to him and Mr. Kallnischkies proceeded to open those also and discover heroin in each of them.

The witness stated that no search warrant had been obtained to open the mail in question which he described as airmail letter type envelopes. At the time Mr. Kallnischkies opened the envelopes, he had no prior information about this case nor had he previously noticed the addresses typed on the envelopes for delivery in this country. These particular articles of airmail, had they been mailed within this country would have been considered the equivalent of first class mail.

> "Q Now, on the face of each one of these envelopes, did they appear to be so-called letter mail, as you looked at the envelope?
>
> A Yes, sir, these are letters. . . ."

It is clear that the first intrusion into this mail occurred at 1:30 p.m. on Monday, February 4, 1974, and that the items searched could not have arrived at the post office that same day. These eight letter type envelopes arrived at the post office from the airport at the latest on Sunday and at the earliest on Saturday. They were kept there for inspection over the weekend because the customs people did not work on weekends although the post office personnel did. Because of several prior heroin mailings from Thailand, Mr. Kallnischkies was generally suspicious of all mail coming in from that country which probably ranged between "200 or 500 envelopes from" there. On occasions mail

would be opened which turned out to contain innocuous material. The particular envelope in question raised a suspicion in his mind:

> "Q In other words is it fair to categorize this as intuition or intuitive?
>
> A Yes, sir."
>
> "You know, if you wanted me to be specific, based on my experience, I would say this is Thailand and possibly heroin."
>
> (A. 28-54)

The cases proceeded to non-jury trial upon the basis of a stipulated record below after various motions raised by the defense were denied by the district court. Upon prior agreement of counsel and the court, twelve of the seventeen drug related counts against Mr. Ramsey in Crim. No. 74-623 were severed and he was adjudged guilty on counts one, two, fourteen, fifteen and seventeen. On February 14, 1975, he was sentenced to concurrent terms of imprisonment for these offenses, the longest of which was 10 to 30 years.

In Crim. No. 74-624 he was adjudged guilty of two firearm's offenses and received lesser terms.[1]

A divided panel of the court of appeals reversed. Judges McGowan and Tamm held that before international letter mail may be opened, a showing of probable cause be made to and a warrant secured from a neutral magistrate. The majority, while recognizing that Postal Regulations include within the term *international letter class mail* items that would clearly be packages, was careful to delimit its definition of the term, for warrant purposes, to that mail matter which common sense tells us are letters. (Pet. App. A 9a-10a, n.6) The majority opinion gives full recognition to the border search exception to the warrant procedure when dealing with packages moving through international mail. (Pet. App. A. 5a-6a) Judge Robb dissenting, thought that the border search exception extended to sealed envelopes moving in such mail, as had two other Circuit Courts of Appeal that had considered the question. (Pet. App. A 19a-20a)

[1] These weapons offenses were, concededly, the fruit of the narcotic arrest and these convictions stand or fall with the heroin offenses. Cf. Pet. 5, n.4; Br. 5, n.4

SUMMARY OF ARGUMENT

The Government's brief contains a great deal of misleading extra-record factual material to support an administrative burden theory, which should not be relied on by this Court. This case concerns the opening of envelope mail which looks exactly like the domestic equivalent of first class airmail letters. Respondent concedes that packages may be opened at the border without search warrants. In developing a theory of undue burden in securing warrants for entering mail, the Government has injected facts into its brief which, at first blush, appear to deal with the number of seizures from envelope mail by customs officers for certain time periods, but which actually include seizures from package type mail in that its definition of *envelope* subliminally encompasses mail matter not in excess of four pounds (except that for Canada there is a sixty pound limit) and with a maximum length of 24 inches and a maximum length, breadth and thickness, combined, of 36 inches.

The statutory history of border search authorization indicates that 19 U.S.C. 482 and its predecessors never contemplated that customs officers could seize incoming international letter mail without warrants therefore. Custom and usage supports this statutory construction and the Government concedes, that for the first 195

years of our nations history "letter mail was not opened by customs officials acting alone . . . " (Br. 21) Furthermore, the unwarranted opening of this mail matter will chill important First Amendment rights. Although the Government asserts that customs officers do not open envelopes unless they have reason to believe that they contain things in addition to correspondence, the Petitioner's own figures show that, upon opening the mail, the officers found *neither* dutiable or prohibited items more than 80 per cent of the time. It is reasonable to infer that such innocent mail opened in excess of 8 out of 10 times contained nothing but correspondence. This chilling effect on free speech will be cured by returning the Customs Service to the penumbra of the Fourth Amendment – as judicial superintendence has a way of making officers more responsible to the public they serve. Furthermore, since the major target of these mail openings is drugs and resultant federal prosecutions, at least 1,000 Drug Enforcement Administration agents who work hand in hand with customs officers stand ready, willing and able to secure search warrants for any true letter type mail and thus relieve the Customs Service of any perceived undue burden.

ARGUMENT

THE WARRANT PROCEDURE OF THE FOURTH AMENDMENT MUST BE COMPLIED WITH BEFORE THE INTERNATIONAL EQUIVALENT OF DOMESTIC FIRST CLASS LETTER MAIL MAY BE SEARCHED AFTER SUCH MAIL REACHES OUR SHORES AND REMAINS IN THE EXCLUSIVE CUSTODY OF THE GOVERNMENT.

A. The Government's brief contains misleading extra-record factual material not to be relied on by this Court.

Prior to writing our instant pleading, we moved to strike the Government's brief on the ground that it contained extra-record factual material and that, furthermore, such material was misleading. After an opposition and reply thereto were filed this Court denied the motion by fiat. In resisting our assault upon the brief the Solicitor General suggested a remedy if our allegations were correct:

> "If the statements of fact should not have been included in the brief, the proper remedy would be for the Court to disregard them, not to strike the brief. If the statements were misleading, the proper procedure would be for the respondent to show, in his brief on the merits, why they are misleading and why the Court should not rely upon them."
> (Opp. 1)

In support of this procedure he offered us the assistance of the Customs Service which provided the information to the Department of Justice in the first instance. (Opp. 3) Although we continue to consider such fact-finding at the appellate level inappropriate we

have, nonetheless, accepted the Solicitor's suggestions in light of his experience in dealing with the Court, the probable acquiescence in the suggested procedure by this Court reflected in the unexplained denial of our motion and, most importantly, to correct the record.

This case concerns the opening of envelopes which look exactly like the domestic equivalent of first class airmail letters. Color photographs of them are contained in the record on appeal to visually attest to this assertion. The court of appeals was careful to limit its ruling solely to the perimeters of the mail matter before it and excluded package mail from the warrant requirement.

> "There is, of course, no ready line available to distinguish letters from packages; the distinction is one of degree. We are satisfied that the envelopes in this case . . ., Government Exhs. 35-40, were in size *and appearance* closer to the letter end of the spectrum and fell outside of the border search exception." (Pet. App. 9a, n.6) (Emphasis supplied)

Respondent Ramsey does not contend that mail matter other than the type appearing in this record is subject to the warrant requirement – he specifically rejects the notion that packages cannot be searched at the border without a warrant. Cf. Br. 13-18.

In support of its administrative burden argument (Br. 24-36), the Government has included in its brief the following facts which nowhere appear in the record and which confronted Respondent Ramsey for the first time upon a reading of that brief:

Page 8.

> "More than one billion envelopes arrive each year. . ."

Page 8-9.

> "In fiscal 1976 customs officers opened approximately 270,000 envelopes (less than 0.03% of the total), of which approximately 48,000 contained dutiable or prohibited items, which is more than three envelopes containing dutiable or prohibited items per officer per working day. In order to find these envelopes, each officer opens approximately 19 envelopes per working day, sorting them from the approximately 1,900 whose exteriors he inspects."

Pages 24-25.

> "The Customs Service informs us that during each of fiscal years 1975 and 1976 more than one billion envelopes and 42 million packages entered the United States from abroad.[19] Most of these envelopes and packages are not accompanied by any declaration of their contents. . ."

[19] "'Envelopes,' in the sense used in this brief, refers to all envelope-shaped mail of any postage rate, and not simply mail moving at international letter class rates."

Page 25.

> "The Customs Service has augmented its staff of 62 officers assigned to inspection of envelopes with trained dogs and an x-ray machine."[20]

[20] "Twenty customs facilities use trained dogs."

Page 26-27.

> "The Customs Service informs us that in fiscal 1975 and again in fiscal 1976 the Postal Service referred for screening approximately 27 million envelopes (about one-fortieth of the envelopes entering the United States in each of those years). The Customs Service estimates that in each of those years its inspectors opened for visual inspection approximately 270,000 pieces of mail,

or one of every 100 examined. Many of these openings were supported only by suspicion; the total openings represented approximately one of every 4,000 envelopes arriving from abroad.

Of the approximately 270,000 pieces of mail opened each year, the Customs Service informs us, it found undeclared dutiable materials in approximatley 27,000. Duty was assessed on these items before delivery. The Customs Service also found 18,000 envelopes containing prohibited items in fiscal 1975 and over 21,000 envelopes containing prohibited items in fiscal 1976.[22] The discoveries of prohibited items in envelopes dwarfed the discoveries in packages: only 748 prohibited items were found in packages in fiscal 1975, and only 915 in fiscal 1976."

[22]See Appendix B, *infra*, p. 7A, which sets out a description of the prohibited items found and seized. This table counts only one item per envelope, but some contained more than one. With 62 officers examining 27,000,000 envelopes yearly, and assuming 230 working days each year, each officer must scrutinize almost 1,900 envelopes daily, or 240 each hour. Each officer opens approximately 19 envelopes daily and finds approximately 3.3 containing prohibited or dutiable items." (footnote 21 omitted.)

Pages 30-31.

"The data provided by the Customs Service shows that fewer than one in 4,000 envelopes is opened, however, and there is no evidence in the record of this case demonstrating that the Customs Service violates its regulation forbidding the reading of letters. There is no practice of routinely opening without a warrant envelopes that appear to contain only correspondence".

Page 35.

"Customs officials who must scrutinize an average of 1,900 envelopes daily, and who now open an

average of 19 envelopes daily, could not find time to draw up 19 applications for warrants. . . ."

In addition, Appendix B (Br. 7a) is an extra-record compendium of alleged customs seizures from categories designated as letter mail and parcel mail for 1975 and 1976. Seizures of prohibited items from letter mail for this period total 39,326 items and such seizures from parcel mail total but 1,663 items. Upon the bases of these facts the Government somberly warns:

"If probable cause and a warrant were required for each opening, the inspection process would grind to a halt."

(Br. 9)

Pursuant to the Solicitor's offer, on December 20, 1976, counsel representing Respondent Charles W. Ramsey met with Dennis Cronin, Esq., General Attorney U.S. Customs Service and Mr. Michael D'Angelo, Operations Officer Duty Assessment Division, U.S. Customs Service. We were advised by these gentlemen that the data in the Government's brief are based upon Customs Form 151 which is a report prepared by each customs officer for each mail seizure he makes. The type of mail matter searched is categorized with a "P" for package mail and "L" for letter class mail. There is no requirement that an accurate description be given on the form of the mail matter opened or that pictures thereof be taken. Furthermore, we were also advised that the "L" class mail on the form – which has been translated to "envelope" in the government's extra-record fact formulation – is defined by 39 C.F.R. 22.1(b), (c), which all customs inspectors utilize in filling out the 151. Those regulations define letter class mail to include pieces not in excess of four pounds (except that for Canada there is a sixty pound limit) and with a maximum length of 24 inches and a maximum length,

breadth and thickness, combined, of 36 inches. The "L" or "P" classification does not alter, we were told, by the securing of the mail matter with string nor because of the postage rate at which it moves through the mails. Thus, when the Government's brief alludes to customs officers opening approximately 270,000 "envelopes" in fiscal 1976 the term envelope as used obviously includes a plethora of mail that even grade school children would call packages.[2]

For all we know 20 percent, 50 percent, or perhaps, 80 percent of these "envelopes" could very well have been packages when viewed from a common sense angle of vision and, concededly, not subject to the warrant requirement.

It is for these reasons we have consistently urged that the extra-record material herein is misleading and not the stuff upon which this Court's judgment should rest.

Furthermore, the government apparently believes that it has adequately discharged its burden of apprising us as to the real meaning of "envelope," via footnote 19, *i.e.*,:

> " 'Envelopes' in the sense used in this brief, refers to all envelope-shaped mail of any postage rate, and not simply mail moving at international letter class rates."
>
> (Br.25)

[2]In some of the "L" 151's turned over to us for review we were not suprised therefore to find, *inter alia*:

1. "Suspected hashish inside cassette" (*sic*).
2. "Suspected hashish in plastic bag inside cassette with brown wrapping paper."

No wonder the Government could confidently allege that "the discoveries of prohibited items in envelopes dwarfed the discoveries in packages. . . ." (Br. 27)

In addition, when it is postulated that in "fiscal 1976 customs officers opened approximately 270,000 envelopes . . ., of which approximately 48,000 contained dutiable or prohibited items, ..." (Br. 8), this Court might find it interesting to know how this 270,000 approximation was arrived at. If a search does not yield dutiable or prohibited items a form 151 is not filled out and no record is kept of the intrusion. Mr. D'Angelo explained to us how this figure was reached in the absence of any records as follows. Nine key regional customs people were contacted pursuant to the Justice Department's request for the information who in turn relied on their mail branch people to think back over the year and, based on their experience, to arrive at a figure as to how many "L"s they thought were opened in fiscal 1976 in that region. The nine key regional people in turn each submitted their estimates which totalled up to "approximately 270,000 envelopes." (Br.8)[3]

By some alchemy not yet fully revealed to us, all of these extra-record facts have been dubbed "legislative facts" or "legislative information." (Opp. 2) and therefore, to be properly injected into the Government's brief. However, for the reasons we have advanced we cannot take the Government's "legislative facts" seriously, for we do not know the accurate contours of any oppressive administrative burden that

[3]In light of this explanation to us by Customs, we reject the accuracy of footnote 2 in the Government's Opposition to our Motion to strike its brief:

"The Motion to Strike asserts (p. 3) that the Customs Service data were 'generated . . . specifically to further the quest for reversal in this Court.' This statement is in error, as respondent's counsel was informed before filing his motion; the information contained in Appendix B and elsewhere in our brief is preexisting information compiled for its own purposes by the Customs Service." (Opp. 3, n.2)

might exist and thus, cannot intelligently respond to the Government's self-generated argument on this score.[4]

[4]Interesting to note in this regard is the fact that of some 105 sample Customs Forms 151 turned over to us on a randomly selected basis which reported seizures from "L" designated mail matter from around the country, of the 101 that were readable, *every single one* concerned illicit drugs in small quantities. Although the Government's brief hawks other fears of smuggling; no jewels, precious metals, microfilm or money (Br. 18) were found in any of this "L" type mail. Furthermore, based on our experience, the senders do not appear to be large scale dope dealers, but rather servicemen and students forwarding small samples of drugs back home. Thus, from this sampling provided to us by the Government, the following were found in small quantities:

40 "L"s – Hashish
29 "L"s – Cocaine
26 "L"s – Marijuana
3 "L"s – Liquid Hashish
2 "L"s – Heroin
1 "L" – Cocoa Leaves.

In many of these cases the drugs were turned over for processing to agents of the Drug Enforcement Administration who work closely with Customs as was done herein. Since it appears that the overwhelming majority of such searches involve drugs and criminal law enforcement, there are least one thousand D.E.A. agents around the country who stand ready, willing and able to rapidly obtain search warrants for contraband entering the country in true letter type mail and thus relieve the potentially burdened customs inspectors of this chore. Cf. *United States v. Van Leeuwen*, 397 U.S. 249 (1970), wherein this Court unanimously upheld the authority of officials to detain domestic first class mail for 29 hours while they investigated suspicious circumstances and obtained a search warrant.

In addition, the Government's brief states that undeclared *dutiable* materials were discovered in approximately 27,000 pieces of mail in fiscal 1976 and 21,000 envelopes contained *prohibited* items during this same period. (Br. 26) Appendix B solely seeks to report seizures of *prohibited* items and nowhere in the brief are we specifically told what the dutiable materials consisted of or the precise nature of the mail matter they entered in. Looking at Appendix B in light of our assertions of

(continued)

B. The border search exception to the warrant requirement does not extend to the international equivalent of domestic first class letter mail.

The starting point of any discussion concerning the so-called "reasonableness" of government agents seizing the property of citizens, is the constitutional mandate that search warrants are the preferred route thereto. In

(footnote continued from preceding page)

what "L" type mail really refers to, we see that pornography accounts for some 15,000 pieces of "L" mail seizures while "soft" drugs account for the vast majority of the remaining 6,000 seizures. By pornography we assume the Government is referring to the commercial variety thereof and not servicemen or students sending dirty pictures to their anxious friends back home. For if it is referring to the latter, then widespread intrusions into privacy are committed daily by customs officers. Furthermore, "pornography" includes photos, books and films, and we find it hard to believe that the bulk of the 15,000 pornography seizures were not from "L" mail matter weighing up to four pounds and having a maximum length, breadth and thickness, combined, of 36 inches. 39 C.F.R. 22.1(b), (c). Thus, it is not unreasonable to assert that most of this pornography arrived to our shores in "packages" which could be seized without a warrant anyway. Taking the remaining 6,000 "L"s at face value, an experienced customs officer knows when suspected drugs are his target and this amounts to but 26 warrants per day, assuming 230 working days each year. 26 search warrants per day to be secured by customs agents aided, if deemed desirable, by at least 1,000 D.E.A. agents on a countrywide basis is no real burden at all. Again using the Government's own figures at face value, we are told that customs officers "do not open envelopes unless they have reason to believe that they contain things in addition to correspondence" (Br. 27); this procedure accounted for 48,000 seizures for 270,000 "L" mail openings in fiscal 1976–an error of judgment rate in excess of 80 percent. (Br. 27) We therefore must conclude that nothing but correspondence was found over 80 percent of the time and that a probable cause/search warrant requirement will tighten up this presently unconstitutional procedure that tends to chill First Amendment guarantees.

construing this command of reasonabless, there has been general agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967). The presumption has always been that a warrant should be obtained whenever practicable, and exceptions to the warrant requirement have been based on exigent or other circumstances where delay would frustrate legitimate police activity. The warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971).

In light of this well entrenched approach to the limitations on governmental power, we find somewhat anomalous Petitioner's nerve-center theory that a petty official can search at his whim any incoming international letter class mail–"[n]othing else–not suspicion, not probable cause, and not antecedent judicial approval–is constitutionally necessary." (Br. 12, footnote omitted.) The Government seeks to support this heady contention on the basis of alleged long-term statutory authority and, the force of history.

1. Statutory Authority.

We are told that "the officer was acting pursuant to authority granted by a statute enacted in 1866 that explicitly allows customs searches of 'envelopes' (See 19 U.S.C. 482 . . .)." (Br. 10)

19 U.S.C. 482, provides in relevant part:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine * * * any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; * * *.

A proper understanding of that statute as it presently exists begins with *Carroll v. United States*, 267 U.S. 132 (1925), which sustained the probable cause search of a car without a warrant under the National Prohibition Act because of the exigencies of apprehending a fleeing car. In reflecting upon such searches the Court alluded, *inter alia*, to the progenitor of 19 U.S.C. 482 which:

> "[M]ade lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandize which was subject to duty or had been introduced into the United States in any manner contrary to law. . . .". *Carrol, supra*, at 151. The Court alluded to this statute and similar ones–
>
> "To show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the

locality or jurisdiction in which the warrant must be sought." *Id.* at 153.

Thus, this Court long ago viewed the border search concept as inseparably entwined with the element of exigence, lest the offending party and his wares disappear into a still rugged country. Where there was no danger of that disappearance, however, a warrant was required even though smuggling was the target. Thus, the foundation Border Search statute considered in *Carroll v. United States, supra,* 3 Stat. 231, 232, March 3, 1815, distinguished between an ambulatory and a permanent situation and mandated a search warrant for the latter.

> "And if any of the said officers of the customs shall suspect that any goods, wares, or merchandise, which are subject to duty, or shall have been introduced contrary to law, are concealed in any particular dwelling, store or other building, he shall, upon proper application, on oath, to any judge or justice of the peace, be entitled to a warrant . . . Provided always, that the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, *or to packages on any animal or animals or carried by man on foot.*" *(Emphasis supplied.)*

We therefore see that search warrants were also required for packages unless there was danger of their disappearing via man or beast. It was this statute which was alluded to in *Carroll* when it was observed that neither this section "nor any of its earlier counterparts has ever been attacked as unconstitutional." 267 U.S. 152. 13 Stat. 441, 442, February 28, 1865, which continued the border search power, only provided for the warrantless stopping and searching of persons or

vehicles in transit. For non-moving situations the statute provided:

> "That in case any store, warehouse, or other building shall be upon or near the boundary line between the United States and any foreign country, and there is reason to believe that [items are placed there in violation of law], and the collector . . . or surveyor of customs, shall make oath before any magistrate . . . , that he has reason to believe, and does believe, that such offence has been therein committed, such officer shall have the right to search such building. . ."

14 Stat. 178, July 18, 1866, for the first time included language specifically authorizing customs officers to search any "trunk or envelope." But it is amply clear from both a reading of the statute and its predecessors, that such searches without warrant only applied to trunks or envelopes on board vessels or upon vehicles, beasts or persons.

> Sec. 2 thereof [authorized customs officers to board any vessel, search the same and] "any person, trunk, or envelope on board. . . ."
>
> Sec. 3 authorized [such officers to also search any] "vehicle, beast, or person on which or whom he or they shall suspect there are goods . . . . "[subject to duty or introduced contrary to law,]" whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have reasonable cause to suspect, there are goods which were imported contrary to law; and if any such officer . . . shall find any goods, wares, or merchandise, on or about any such vehicle, beast, or person, or in any such trunk or envelope, . . ." [he shall seize and secure the same for trial. Every] "such vehicle and beast, or either . . . *and all other appurtenances, including trunks, envelopes,* covers and all means

of concealment . . . ." [shall be subject to seizure and forfeiture.[(Emphasis supplied)

The present statute, 19 U.S.C. 482, is but an abbreviated form of its predecessors which, from this historical perspective, does not authorize the opening of incoming international letter class mail when there is no danger of that mail moving before a warrant can be obtained. Cf. *United States v. VanLeeuwen, supra.*

The Court in *Carroll* also alluded to border searches as follows.

> "Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." 267 U.S. 153-154.

In commenting upon such searches, one court of appeals stated:

> "First and most important is the fact that a border search is conducted incident to conferral of the privilege of admittance to the country, and it is certain that the subject of the search is in fact receiving that benefit . . . In effect, a reasonable border search is 'consented' to in order to obtain a benefit that is only to be accorded those who can show that they should gain admittance and who can demonstrate that they are only transporting goods which can lawfully be brought into this country. Moreover, there is little danger of abuse of such searches. *Zweibon v. Mitchell,* 170 U.S. App. D.C. 1, 39, 516 F.2d 594, 632 (1975) (N.93)

Furthermore, said the Court, in these circumstances of searching travellers and their effects at the border *in their presence,*

> "Over-intrusive searches will be apparent to their subjects and may thus be challenged in court. . . .- Finally, . . . there is no substantial likelihood that

> border searches will chill the exercise of First Amendment rights." *Id.*

We thus fail to see how it can be claimed by the Government that 19 U.S.C. 482 somehow authorized the warrantless search in question.[5]

2. History

If we are correct in our historical reading of the border search statutes, we would expect to find that customs officers did not always feel empowered to open international letter mail at their pleasure and accordingly, did not do so. Support for this hypothesis is no further away than the Government's brief. It is conceded therein that for the first 195 years of this nation's history customs officers did not open international letter mail. "Letter mail was not opened by customs officials acting alone until 1971." (Br. 21) This is clear and convincing proof, we submit, that in this limited zone of private correspondence the border search power contended for does not and never has existed in this republic. In 1970, we are advised, the Post Office and Treasury Department jointly proposed changes in the regulations which became effective in 1971, to authorize the type of search conducted herein. (Br. 22-24)[6]

[5] In responding to Senator Ervin's lament that the 1970 proposed regulations authorizing such searches (see *infra,* History) were propounded without public scrutiny, the then General Counsel of the Post Office Department responded, *inter alia:*

> "There are not statutory provisions dealing specifically with the customs treatment of any type of incoming foreign mail." 116 Cong. Rec. 13864 (1970)

[6] At this juncture we cannot help but envision the various bureaucrats from the two agencies mulling over their changing 195 years of history to allow them to invade all international letter mail at their whim and one inquiring of the assemblage:

> "Do you really think we can do this?"

(continued)

Undaunted by this reverse force of history, Petitioner advises us that customs officers really had this power all along but, unlike all other law enforcement officers, never "used the full power conferred by statute." (Br. 18)

The bold but tortured reasoning to support this claim (Br. 21-24) is properly to be compared with a later assertion by Petitioner in response to our motion to strike its brief wherein it was candidly stated that these "historical practices followed by the Post Office and the Customs Service . . . undermines, to some extent, our argument that the opening of envelopes at the border is justified by force of history." (Opp. 6, n.5)

Ex parte Jackson, supra, concerned domestic mail and the opinion indicates that at one time the post office only carried letters, newspapers, magazines and other printed matter not exceeding eight ounces. "Afterwards books were added and now small packages . . . are transported in the mail." The only items which could be searched without a warrant were those open to inspection and thus, "purposely left in a condition to be examined."

As we see it, the right of border search appears to have always extended to persons, vessels, vehicles, beasts, etc., and their wares entering this country based on the dual concepts of national self-protection and the exigencies of the moment. And, as *Zweibon v. Mitchell, supra,* points out, a consent to search by the entering person for himself and/or his wares inheres in the very act of crossing an international border. From time immemorial such unobtrusive searches have always been anticipated as a consequence of international

(footnote continued from preceding page)

The answer is clear.

> "No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." *Ex parte Jackson,* 96 U.S. 727 (1877).

travel. Not one person reading this brief who has ever travelled to a foreign land has ever done so without expecting and consenting to an invasion of his privacy by customs inspectors. And, as the mail service grew along with the size of what could be mailed, packages were understood to be and were left in a condition to be examined when they reached our shores–an implied consent to have them searched by the sender. (Br. 21) We find no historical support for the sweeping assertion that sealed international letter mail could constitutionally be opened at the discretion of customs inspectors without warrants. Indeed, for a newly founded nation which had engaged in armed rebellion in part because of writs of assistance and general warrants executed by the King's messengers and which generated the Fourth Amendment in response thereto, we find it hard to believe that such a nation would have tolerated for one minute the unfettered opening of its incoming mail by petty officials. At that point in history most Americans were born in England or had relatives and friends there whom they regularly communicated with by mail–a two way inherently personal and private means of discourse. We can only imagine Mr. Jefferson's response to the notion that his return letters could be arbitarily opened before delivery to him, their being "not suspicion, not probable cause, and not antecedent judicial approval" to do so. (Br. 12) That could not have happened however, because at the time, the government layed no claim to such power nor would it have then dared to.

Accordingly, we believe that the full force and effect of *Ex parte Jackson, supra,* applies to the mail matter in the instant case.

> "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be

opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household."[7]

3. The Present

Because searches aimed at the type of mail matter before us were not undertaken prior to 1971, legal challenges thereto have only recently surfaced in the various courts of appeal. While most of these cases sustain the power asserted, *cf.* Br. 10, n.6, none of them—save the one at bar—even begins to carefully analyze the numerous considerations that impinge on the opening of international letter mail. The most recent case, *United States v. Emery*, 541 F.2d 887 (1st Cir. 1976), sustained the border search of a package but pointedly reserved decision as to "first class letters." Other Judges have expressed a similar hesitancy where letters are concerned. *E.g.*, *United States v. Sohnen*, 298 F. Supp. 51 (E.D.N.Y. 1969) ("The Constitution . . . may well prevent the opening of letters, as opposed to packages . . . without a search warrant.");

[7] *Cotzhausen v. Nazro*, 107 U.S. 215 (1882), cited by the Government does not aid its cause. In that case a dutiable shawl was mailed into this country from Germany and was identified as such in writing on the container it came in. This Court variously described that container as a "sealed envelope" and a "letter". Apparently, the nature of the container was not critical because the trial court, in propounding a special verdict to the jury, called it a "package" three times and a "sealed envelope" once. Furthermore, whatever it appeared to be, the customs people—although notified in writing upon the item itself that it contained dutiable material—did not venture to search it themselves. Instead, a customs officer was notified to be present when the shawl was delivered to the addressee and, only after the addressee opened the mail and removed the shawl did the officer seize it. Accordingly, the case does not even remotely resemble the one before us and cannot be thought to condone the power contended for here.

United States v. Swede, 326 F. Supp. 533 (S.D.N.Y. 1971) ("We do not determine whether the Constitution prevents the opening of letters . . . without a search warrant"); *United States v. Various Articles of Obscene Mer.*, 363 F. Supp. 165 (S.D.N.Y. 1973) ("The constraints . . . [of] the Fourth Amendment do apply to Customs searches . . . Some courts have hinted that the standards may be different when dealing with a letter-sized envelope than when it is a package . . . at issue."). Since none of the courts of appeal have critically assayed the statutory or historical factors vis-a-vis the warrantless search of international letter mail—nor even mentioned that the practice only began full blown in 1971—their opinions have little precedential value.

No less than our forefathers, each of us deplores the thought that our private correspondence is subject to unrestrained governmental intrusion. We are not so much concerned in this shrinking world that our letters will be answered from New York, Boston, London or Munich as with the idea that the flow of that communication process will be unimpeded—we expect and demand that our correspondence will remain private. Such expectation is not unreasonable in light of the fact that our wishes were ininterruptedly respected in this regard for 195 years. Such long standing privacy can easily repel the recent assault thereon by the combined forces of the "Post Office and Treasury Department." (Br. 22-24) *Katz v. United States*, 389 U.S. 347 (1967).

In this regard, the court below was properly concerned with the chilling effect the claimed power might have in the hands of customs officers on First Amendment rights.

> "Even if the ordinary practice of the Customs Service is not to read the mail that is opened, ...mere knowledge on the part of

individuals of the practice of routinely opening mail inhibits the exercise of free speech."

* * * *

It thus appears that there is not a sufficient need, and there is too great a risk to personal privacy, to extend the border search exception to permit unrestrained opening of international mail." (Pet. 11a, 13a).

The Government's own extra-record facts bear out the clear and present danger that exists in this area.

At Br. 27 it is asserted: "customs officers do not open envelopes unless they have reason to believe that they contain things in addition to correspondence."

We are elsewhere told that in fiscal 1976, customs officers found 48,000 dutiable or prohibited items in approximately 270,000 pieces of mail. (Br. 8, 26) We have earlier shown how this 270,000 figure was arrived at post facto without records and, accordingly, the figure could easily be 300,000 pieces of opened mail or more. Using this latter figure, customs officers failed to find either dutiable or prohibited items 84 percent of the time they opened "L" type of mail without a warrant. It is also reasonable to infer that, most of the time such innocent mail was opened, it contained nothing but correspondence. This certainly underscores the court of appeals' concern with the danger to First Amendment rights this practice generates. The court below was right on target when it held that a warrant was required for such searches because, *inter alia*,

"by requiring that the inferences to which law enforcement officials are entitled be drawn by neutral magistrates rather than by officers in the heat of duty, . . ., it helps to limit unjustified intrusions upon the private and communicative material contained in letter mail." (Pet. App. 14a-15a).

We are certain that returning the Customs Service to the penumbra of the Fourth Amendment after its six year frolic free of its strictures, will increase the efficiency of its operatives from a dismal 84 percent error rate to one in the 10 to 15 percent range. Judicial superintendence has a way of making officers more responsible in their conduct as indeed it should–this being the very goal of the Fourth Amendment.

To ward off this compelling claim the Government offers, in part, the following palliatives:

1. "[A]ny person who desires to guard against the reading of international correspondence has a simple expedient: he can send [smaller] envelopes . . . [because they do not] give rise to suspicion that they contain something other than correspondence. There has been no showing in this case that customs inspectors open such envelopes." (Br. 30)

* * * *

2. "In fact, the international exchange of ideas does not stand on an equal footing with the domestic exchange of ideas." (Br. 30, n. 24)

A further consideration is the fact that the real apparent aim of present day border searches of mail is criminal prosecution of drug offenses. It is no mere coincidence that 100 percent of the Customs Forms 151 turned over to us on a random basis involved small drug seizures from "L" type mail. And, working hand in hand with these customs officers are D.E.A. agents who handle the evidence and perfect the prosecutions as, for example, in this case. The true targets of the majority of these searches are the U.S. addressees at home whose mail D.E.A. agents could never hope to open on their own. We accordingly find that the Government has observed in this connection:

> "Moreover, in cases such as the instant one, providing for the presence of the addressee when opening the envelope would drastically subvert the prospects for successful prosecution when a crime is involved to which the addressee is a party." (Br. 31, n.25)

Since there is this close working relationship between the Customs Service and the Drug Enforcement Administration, it would only be proper to have D.E.A. agents secure search warrants to aid the prosecution of these domestic crimes.[8] Indeed, in the case at bar, DEA agents, in fact, obtained search warrants for the eight envelopes originally seized at the N.Y. Post Office without warrant and secured a second search warrant for three more suspicious envelopes at the main Post Office in Washington, D.C., which were tied into this case and had not been previously opened. (App. 59) The court below—as we do—thought that this latter seizure seriously compromised the Government's claim of undue burden in securing such warrants. (Pet. App. 17a)

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ALLAN M. PALMER
1707 N St., N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Respondent
Charles W. Ramsey

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[8] The Drug Enforcement Administration informs us that there are presently some 1700 "working agents" in the United States. A working agent is a man on the street making arrests, securing search warrants and the like.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES,

Petitioner,

v.

CHARLES W. RAMSEY and JAMES W. KELLY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT JAMES W. KELLY

IRVING R. M. PANZER
1735 DeSales Street, N.W.
Washington, D.C. 20036
(202) 783-3391

Attorney for Respondent
James W. Kelly
(Appointed by this Court)

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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BRIEF FOR RESPONDENT JAMES W. KELLY

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether probable cause and a search warrant are required before customs officials may open letter-class mail entering the United States from abroad, when they suspect that the letter-class mail contains smuggled goods.

STATEMENT OF THE CASE

We accept the Government's statement of the case but we add one statement. After the seizure in New York of the eight envelopes which were opened without a search warrant, the authorities there alerted the authorities in Washington, D.C., and the latter authorities then sought and obtained search warrants for three similar envelopes which were being detained at the Washington, D.C. Main Post Office, before they opened those three other envelopes. (A. 80-81; see Pet. App. 17a)

SUMMARY OF ARGUMENT

The issue involved here is presented to this Court for the first time. Are probable cause and a search warrant required before Government agents may open letter-class mail entering this country from abroad, when they suspect that the letter-class mail contains contraband? This issue, though going to the heart of our Constitutional protections, has no history supporting the Government's position, because it was not until 1971 that Customs officials were authorized to open such mail without the consent of the addressee. If there is a meaningful history, it speaks in favor of respondents, because the pertinent statute (which was enacted in 1866) purported to authorize the opening of "envelopes" without consent, yet for 105 years—until 1971—that authorization was not utilized by the Government.

This case involves the convergence of Fourth Amendment and First Amendment interests, thereby heightening—perhaps to its greatest point—the protection attempted to be insured by the Fourth

Amendment. The Court is concerned here with letter mail, or what may be letter mail, and this means that our most personal, our most cherished, our most private thoughts and ideas may be involved. As Mr. Justice Holmes put it, dissenting in *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921), "The use of the mail is almost as much a part of free speech as the right to use our tongues."

A search and seizure without a warrant is, unless an exception can be shown, "unreasonable" per se within the meaning of the Fourth Amendment. The exceptions permitted by this Court are few and they are narrow; they are carefully defined. The Government's position here is that there is such an exception, and that it applies or should apply to letter mail. The Government stresses the exigencies of the situation, pressing on this Court (by citing statistics not contained in the record, not verifiable by respondents) the argument that unless an exception is granted here, Government agents cannot keep up with the flood of mail entering this country every year.

We do not concede that the Constitution does not operate at the border, as Petitioner seems to contend, but we limit our argument here to the issue before the Court—the issue of letter mail. Even if there is a "border search" exception for other things (including packages, as some lower courts have held), letters rise to a different level of Fourth Amendment protection; letters require a search warrant.

The contention that it is too burdensome to obtain a search warrant, that it is impracticable because of the limitations of personnel and funds, is a familiar one to this Court. The argument that the Constitution is (once again) interfering with the diligent enforcement of the laws is one that Mr. Justice Black used to greet by

saying that of course the Bill of Rights interfered with some efforts at law enforcement—that was its purpose. Or, as this Court said in *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973), the "needs of law enforcement stand in constant tension" with Constitutional protections against certain exercises of official power.

The immobility of letters, the power of the authorities (sanctioned in *United States v. Leeuwen*, 397 U.S. 249) to detain mail for a reasonable period in order to investigate the situation and then—if appropriate—to obtain a warrant, the use of trained dogs, X-ray machines, and other sophisticated methods of detecting contraband, all contribute to the conclusion that the protection afforded to letter mail by the Constitution far outweighs any burden placed on Government officials. We do not in any way decry the argument of the Government that a warrant requirement for letter mail would indeed make its burden greater, but we have no doubt that the burden can be met. It is instructive here that the authorities in Washington, D.C., alerted to the presence of similar envelopes in the Post Office, did what the authorities in New York did not do—they sought and obtained a warrant before they opened the additional envelopes.

Indeed, the record in this case shows that on the facts of this case itself, there was no emergency, no need to avoid the warrant requirement. The six envelopes opened here arrived at Kennedy Airport possibly on a Friday; they were not opened there but instead (for the convenience of the Government) were transported to the New York City General Post Office, at which they were inspected and opened on the following Monday. It is thus possible that the letter mail involved here spent 72 hours in the United States before being inspected and opened, thus eliminating

from the situation any "border search" notion of immediacy of action required to enforce the law.

ARGUMENT

Preface

The extra-record material contained in the Government's brief is improper and should be stricken

The Government's brief, pp. 24-35 and Appendix B, states and relies upon "facts" not contained in the record of this case, and it attributes these "facts" to sources unverifiable by us. Thus the Government says, pp. 24-25: "The Customs Service informs us that during each of fiscal years 1975 and 1976 more than one billion envelopes and 42 million packages entered the United States from abroad." Again, p. 26, the brief says that the "Customs Service informs us that in fiscal 1975 and again in fiscal 1976 the Postal Service referred for screening approximately 27 million envelopes . . ." Page 25 states that the Customs Service has 62 officers assigned to inspection of "envelopes;" footnote 22, p. 26, states that each officer must scrutinize about 1900 "envelopes" daily, or 240 each hour, and opens about 19 "envelopes" each day. Other such "facts" are sprinkled through the remainder of the brief and in Appendix B ("Source: Information supplied by the Customs Service.")

The reason for the Government to build its case around this kind of data, not contained in the record and not available in the form of official reports or other verifiable source, is clear. The Court of Appeals in the opinion below, said (Pet. App. 16a) that the Government had suggested that a warrant procedure

would be impracticable, but "there is absolutely nothing in the record to support this assertion." In an obvious attempt to cure this deficiency in the record, the Government has—at this level of the case—resorted to non-record materials.

The Government is attempting to intimidate the Court, to overwhelm it, by saying that the Customs Service has stated that "more than one billion envelopes" are entering the United States from abroad, etc. Our inability to check on this alleged fact is frustrating; this is an advantage that one litigant is not supposed to have over another, in our jurisprudence. But this is more than frustration. Our suspicion is aroused by the Government's use of the word "envelope" and the sentence (brief, p. 25): "Many of the envelopes are large, bulky and stiff, and they conceal their contents as well as does a cardboard box." At this point it begins to appear that the Government's one billion "envelopes" may have nothing to do with the case before the Court, which involves letter-type envelopes, embraced (as we will show) in the penumbra of the First Amendment. And indeed the Government then obligingly shows that its "envelopes" may be more like packages than like letters by defining the term in footnote 19, p. 25:

> "Envelopes, in the sense used in this brief, refers to all envelope-shaped mail of any postage rate, and not simply mail moving at international letter class rates."

Indeed, in the Memorandum for the United States in Opposition to the Motion to Strike (p. 5), responding to our joint motion to strike the brief, the Government says that the mail being analyzed here is divided into "envelopes" and "packages" on a "common sense" basis. It turns out that anything flatshaped is defined as an "envelope," and could be as large as 9 inches by 12

inches, and the envelope could be padded—in fact, the Government says (p. 5), an "envelope" could be as large as a small "Jiffy bag," which is defined as "a padded envelope, typically having two thicknesses of stiff paper on each side and a thin layer of foam or excelsior between." We note, in fact, in Appendix B of the Government's brief, that among the items found in what the Customs Service has informed the Department of Justice is "letter mail," as distinguished from "parcel mail," are weapons and switch-blade knives.

Since a principal concern of the opinion of the Court of Appeals in this case was for First Amendment values in what we customarily term "letters," containing one's private thoughts and communications, which will be a focal point of this brief as we develop the argument infra, it seems obvious that the Government is attempting to introduce matters alien to this case. An "envelope" that can contain a weapon or a switch-blade knife, an "envelope" that is really a Jiffy bag, is not what we commonly term a letter.

If we were able to cross-examine the proponents of the "one billion envelopes" figure and the other non-record data, as we ought to have a right to do, we might well be able to show the non-relevance of much of it. In stating the source as "the Customs Service informs us," the Government here is utilizing impermissible record sources and is preventing us from exposing any irrelevancies in the data.

On occasion the brief does not even attribute the non-record fact to "the Customs Service informs us" but simply states non-record matters as fact. Thus, for example, on page 25, we are told—without any citation or attribution—that dogs "can smell contraband only if it gives off discernible odors; . . . The odor of heroin is exceedingly faint, and it can be masked." We are told the physical limits of X-ray machines and trained dogs.

We know nothing of any of these alleged facts. They do not appear in any official report or in any publication of which judicial notice could be taken. They appear to be contained in some inter-office memorandum between the Department of Justice and the Customs Service. A brief in the Supreme Court of the United States, however, is not an inter-office memorandum.

By way of contrast, we point to decisions of this Court such as *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), in which the Court quotes estimates by the Government of the number of illegal immigrants in the United States. The figures differed widely, though only two years apart, but at least were ascertainable and were taken from official sources. One was from evidence supplied to a Congressional hearing; the other was taken from an Annual Report of the Immigration and Naturalization Service. See footnote 4 of the opinion. Footnote 12 of that opinion refers to sources such as the Census and other INS Annual Reports.

It is axiomatic in our jurisprudence that the record made in the trial court is sacrosanct. It cannot be supplemented, ex parte, at the appellate level, where the alleged new "facts" are in dispute as to their meaning and their relevancy and where they cannot be found in verifiable sources. These are not, as the Government claims, "Brandeis brief" data; these are not references to official reports or to published studies, or even to magazine articles or newspaper stories. These are unverifiable fighting facts, designed to influence the decision in this case, and should be subject to investigation and cross-examination. We protest the use of this material; we urge the Court not to consider it; we move that it be stricken from the Government's brief.

1. This case involves both Fourth Amendment and First Amendment rights

The Government has presented this case in its brief as if it contained only Fourth Amendment issues. Its only recognition that something more than the "unreasonableness" clause and the warrant clause of the Fourth Amendment are involved comes on pp. 29-32 where we are told that while the privacy interest in domestic communications by first class mail "is sufficient to require probable cause and a warrant before an envelope can be opened," yet "that requirement ought not to be extended" to letter class mail entering the country from abroad. Brief, p. 29. The Government goes on to tell us (p. 30) that one who wishes to guard against the reading of his international correspondence should take care to "send envelopes that are not so large or bulky that they give rise to suspicion that they contain something other than correspondence," but it also assures us solemnly that the appropriate regulation, 19 C.F.R. 145.3, provides that no correspondence may be read without a warrant, and this should amply provide a safeguard against the "chilling effect" (perceived by the Court of Appeals) that openings of letters may have on the expression of ideas.

It was just this latter point, the possibility of illegal reading of mail by Government agents and officers, that led the court below to comment pointedly on the fact, documented in official reports, that the Central Intelligence Agency did for some twenty years, from 1953 to 1973, do exactly that–it opened and read, without a warrant, international correspondence addressed to thousands of American citizens. The Federal Bureau of Investigation cooperated by giving the C.I.A. names and categories of persons and organizations in

whom it had an interest and whose mail it desired to be opened. The court below, saying that this Court has indicated that limits on search and seizure must be especially strong where First and Fourth Amendment values coincide, *United States v. United States District Court*, 407 U.S. 297 at 313-14 (1972), *Stanford v. Texas*, 379 U.S. 476, 485 (1965), said:

> The Court has also noted, with reference to the need to enforce Fourth Amendment protections, that "[h]istory abundantly documents the tendency of Government–however benevolent and benign its motives–to view with suspicion those who most fervently dispute its policies." 407 U.S. at 314. The recent disclosures about the widespread illegal searches of mail by United States intelligence agencies, see, e.g., REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES [THE ROCKEFELLER COMMISSION], June 1975, at 101-15, 168; S. Rep. No. 755, 94th Cong., 2d Sess., Book II, at 12, 17, 38, 62, 107-08 (1976); *id.*, Book 3, at 559-677; *Hearings before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong. 1st Sess. Vol 2, at 1-2, 15-16, 51-63, 66, 76 (1975); *id.*, Vol. 4 at 2, 4, 6-7, 10-11, 21-22, 31-35, 38, 43, 148, 150, 163; *id.*, Vol. 6, at 202-06, 367, highlight the importance of the Supreme Court's observation. (Pet. App. 12a)

The letters involved in this case were airmail letter class mail, the equivalent of "first class mail" (a phrase technically applied only to domestic mail–see A. 29, 32, 41). We are then, in this case, dealing with letters or what may be letters.

The Government throughout its brief stubbornly refuses to use the word "letter" and instead employs the word "envelope," presumably for fear that "letter"

will evoke–as it did for the court below–the consideration of First Amendment values as well as Fourth Amendment rights. Indeed, the Government's paranoia goes so far that in stating the First Circuit's reservation as to a "letter" (as opposed to packages) in *United States v. Emery*, 541 F.2d 887 at 889 (1976), the Government leaves off the quotation marks and changes the word "letter" into "envelope." Brief, pp. 10-11, n.6.

But it is *letters*, not envelopes, we are concerned with here. When letter-type mail arrives from abroad, it must constitutionally be presumed to contain what we commonly call a letter–that is to say, private correspondence–since "a search is not to be made legal by what it turns up," *United States v. Di Re*, 332 U.S. 581 at 595 (1948), and it will not avail the Government later to say that the search revealed that the envelope did not contain a letter. And as the court below said, in what may be the core of its opinion (Pet. App. 11a):

> Finally, and probably most important, letter mail is a vital means of communication in our society. Letters express the most important and sensitive of our personal, familial, political, professional, and financial affairs. They implicate both our deepest privacy and our interest in free expression, far more than packages or suitcases or automobiles. In the words of Justice Holmes, "the use of the mail is almost as much a part of free speech as the right to use our tongues." *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting), quoted with approval in *Blount v. Rizzi*, 400 U.S. 410, 416 (1971), and *United States v. Van Leeuwen*, supra, at 251.

We know that there is a First Amendment right to "receive information and ideas:"

> It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive . . ." *Martin v. City of Struthers*, 319 U.S. 141 . . . (1943) . . . This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

We know, too, that the Fourth Amendment "gives concrete expression to a right of the people which 'is basic to a free society'." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

As in *United States v. United States District Court*, 407 U.S. at 313-314, there is in the case at bar "a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime . . . 'Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.' *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961)."

The question of "reasonableness" under the Fourth Amendment, posed by the Government (brief, p. 12), is thus not to be answered in this case by Fourth Amendment principles alone. In a case such as this, involving the Constitutional values of freedom of speech, freedom of correspondence, freedom of expression of views, it may well be "unreasonable" to utilize a warrantless search and seizure that might be "reasonable" in other situations.

The "reasonable expectation of privacy" principle may be another way of expressing the issue here. One has a "reasonable expectation of privacy" in a private home. *Weeks v. United States*, 232 U.S. 383 (1915). He has that same expectation of privacy even in a public telephone booth, and even though he is visible through the glass, *Katz v. United States*, 389 U.S. 347 (1967),

because as the Court said there, p. 351, "the Fourth Amendment protects people, not places." The Court's words in *Katz* as to the right of the defendant to private communication are instructive here (389 U.S. at 352):

> "No less than an individual in a business office, in a friend's apartment, or in a taxicab [citing cases], a person in a telephone booth may rely upon the protection of the Fourth Amendment . . . To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

And the Court struck down in *Katz* an electronic "search and seizure" which did not even involve physical penetration of the telephone booth, and even though the agents "did no more here than they might properly have done with prior judicial sanction," 389 U.S. at 356. We believe letter-mail rises to the same degree of "expectation of privacy" as a telephone conversation.[1]

The Government cites a number of cases, see brief at footnote 6, p. 10, for the proposition that every court other than the court below has held to the contrary of the decision below. That statement is not correct. At least three courts, in actions that are significant, felt it imperative to distinguish *letters* from *packages*—the very

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[1] It has been said, see *United States v. King*, 517 F.2d 350, 354 (5th Cir., 1975), that persons could have "no reasonable expectation that their letters, mailed from abroad, would remain uninspected." We do not agree with that, and we note that the court relied in part upon *United States v. Doe*, 472 F.2d 982, 985 (2d Cir., 1973). A glance at that page of the *Doe* case reveals that the court there said there could be no reasonable expectation of privacy "with regard to a large *package* mailed from a foreign country, which is represented to contain non-dutiable merchandise." (Emphasis added) Letters were not involved.

point made by the court below—and to reserve the question of letters, although they agreed that packages may be opened and searched without a warrant and without probable cause. Implicit in the distinction made by those courts is the First Amendment issue that springs to life when letters are involved. See *United States v. Emery*, 541 F.2d 887, 889 (1st Cir., 1976), saying: "We agree with the holding in *Odland* at least insofar as it concerns packages as opposed to first class letters;" *United States v. Swede*, 326 F. Supp. 533, 536 (S.D.N.Y., 1971), which categorized the mail before it as a "package," saying that "we do not determine whether the Constitution prevents the opening of letters, as opposed to packages containing merchandise, without a search warrant;" and see also *United States v. Sohnen*, 298 F. Supp. 51, 55 (E.D.N.Y., 1969), indicating that it might reach a different result where letters, rather than packages, were involved. In the *Sohnen* case, Judge Weinstein had before him a warrantless search of a sealed package containing twelve gold coins which had been mailed from Switzerland, and had been opened by Customs agents because "the weight and feel of the package were unusual and it did not bear a required label stating that it could be opened for customs inspection." 298 F. Supp. at 53. The court held that because the package lacked the required label, and (p. 55) "heft indicated the presence of some sort of heavy metal and spectroscopic examination revealed disc-shaped objects," the search did not exceed constitutional limits. Judge Weinstein reviewed the history of the "border search" exception, citing the well-known quotations from *Carroll v. United States*, 267 U.S. 132 (1925), and *Boyd v. United States*, 116 U.S. 616 (1886), quoted in the Government's brief here at pp. 13, 16) concerning the authority to conduct border searches without a warrant and without probable cause, much as the Government has done in this case, but then he said (298 F. Supp. at 55):

> "The Government's power to search international mail for customs purposes is not unlimited. The Constitution . . . may well prevent the opening of letters, as opposed to packages containing merchandise, without a search warrant."

Judge Weinstein went on to say that the Fourth Amendment's impact on searches of *merchandise* coming in from abroad is limited by the customs power "and the absence of any First Amendment interest."

The lower federal courts, then, have not been insensitive to the First Amendment implications of this case.[2]

2. The "Border Search" exception to the warrant requirement of the Fourth Amendment does not include letter-mail

The Government's contention is (brief, p. 33)

> that both history and compelling exigencies attending the enforcement of the customs laws dictate that customs authorities be permitted to open envelopes such as those involved in the instant case without any particularized suspicion that any given envelope contains dutiable items or contraband, and certainly without suspicion amounting to probable cause.

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[2] The only decisions which squarely hold that letters are subject to the "border search" exception to Fourth Amendment requirements, *United States v. King*, 517 F.2d 350 (5th Cir., 1975), *United States v. Odland*, 502 F.2d 148 (7th Cir., 1974), cert. den. 419 U.S. 1088, *United States v. Milroy*, 538 F.2d 1033 (4th Cir., 1976), cert. den. June 7, 1976, *United States v. Bolin*, 514 F.2d 554 (7th Cir., 1975), *United States v. Barclift*, 514 F.2d 1073 (9th Cir., 1975), do so without any apparent recognition that the First Amendment is involved in the determination of the issue.

Indeed the Government begins its argument (p. 12) with the naked assertion, devoid of any reference to prior cases of this Court, that the opening of the letters in this case was "justified by the single fact that the officer knew that the envelope was entering the United States from abroad."

This idea that the Constitution does not operate at the border, and that describing an intrusion into international letter mail as a "border search" removes it completely from the protection of the Fourth Amendment, finds no support in the decisions of this Court. And indeed, none is cited.

Nor is the issue primarily one of "reasonableness," as the Government seems to present it, under the "unreasonable searches and seizures" clause of the Fourth Amendment. This Court has consistently rejected attempts to eviscerate the totality of the Amendment. In *United States v. United States District Court*, 407 U.S. 297 (1972), the Court refused to accept the formulation that the relevant test was not whether it was "reasonable to procure a search warrant but whether the search was reasonable," saying:

> This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language . . . "It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency . . . *Coolidge v. New Hampshire*, 403 U.S., at 481 . . ."

A search and seizure without a warrant is, unless an exception can be shown, "unreasonable" per se within the meaning of the Fourth Amendment, *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967), and the Government must shoulder the burden of demonstrating to this Court the applicability of an exception, *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The Court has repeatedly stressed that the exceptions to the warrant requirement are indeed narrow in scope.

Coolidge v. New Hampshire, supra; *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Just the other day, January 12, 1977, in *G.M. Leasing Corp. v. United States*, ____ U.S. ____, 45 U.S. Law Week 4098 at 4102, the Court reaffirmed its statement in *Camara:*

> "[O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

The *G.M. Leasing* case unanimously held unconstitutional a warrantless search of books and papers even though a corporation (not an individual) was involved, and even though the search was made at an office (and not a home).

We concede, however, that the idea that a border search is exempt from the Constitution, from the Fourth Amendment, does indeed appear to be embedded in the cases in the lower courts. Even the court below seems to have accepted the view that there is a "border search exception" for searches of packages (Pet. App. 5a-6a) and for automobiles and persons (Pet. App. 7a), and that the only question in this case is whether or not letters are different.

We agree with the court below that letters *are* different; that letter mail presents issues, embraced in First Amendment protections, not found in other categories of objects being searched or seized; but we do not necessarily agree that there are areas in this country—the borders—in which the Constitution does not operate. As is said in the Note, *From Bags to Body Cavities; the Law of Border Search*, 74 Col. L. Rev. 53, 82 (1974):

> While it is dogma among the lower courts that border searches are immune from the traditional warrant requirement, there is no particular reason why this should be Border search is but one of several exceptions to the general rule that no search shall occur absent a magistrate's imprimatur. But these exceptions are not absolute; they are at least purportedly limited by the principle that "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." [Citing *United States v. United States District Court*, 407 U.S. 297, 318 (1972).]

It is not necessary, however, to address this issue in the case at bar. We are satisfied that even assuming arguendo the full force of a border search exception for other purposes, this case does not fall within it.

The Government states (brief, p. 15) that it relies upon 19 U.S.C. 482, which purports to authorize a Customs official "to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; . . ."[3]

The Government first contends that the argument from history supports its position here—that "border searches on less than probable cause are an accepted part of our constitutional heritage." This contention unfortunately gets off to a bad start by citing (brief, pp. 15-16) an alleged quotation from *Boyd v. United States*, 116 U.S. 616 (1886), as follows:

[3] In saying "wherever found," which may be nowhere near a border, and may in fact apply to trunks or envelopes that have never crossed a border, the statute obviously goes too far. Cf. the Border Patrol cases of this Court in areas removed from the border, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), *United States v. Ortiz*, 422 U.S. 891 (1975), *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

> The Court wrote in Boyd v. United States, supra, 116 U.S. at 623, that searches at the border for smuggled goods "are totally different things" from inland searches.

This Court said no such thing in *Boyd*, as is seen from the full quotation contained in the margin.[4] The *Boyd* case has nothing to do with warrantless border searches or with the border at all; it involved whether the seizure of Boyd's books and papers amounted to his compulsory production of evidence and thus a violation of his privilege against self-incrimination. Nor did the case have anything to do with letters or letter-type mail; it was concerned with the seizure of thirty-five cases of plate glass imported into the country.

We must comment, also, on the much-cited quotation (brief, p. 16) from *Carroll v. United States*, 267 U.S. 132 (1924), utilized frequently—as here—to support the claim that the border search exception has been recognized by this Court, on the ground of national self protection. In that quotation, after saying that it would be intolerable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, because persons lawfully within the country have a right to free passage without interruption or search, the Court said (pp. 153-4):

> Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in,

[4] The full quotation reads:

> The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof *are totally different things* from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. 116 U.S. at 623. (Emphasis added)

and his belongings as effects which may be lawfully brought in.

The quotation is accurate, but it is pure dictum. *Carroll* had nothing to do with the border at all, and a fortiori it had nothing to do with letter mail arriving at the border. It involved a police seizure of liquor by stopping an automobile traveling between Detroit and Grand Rapids in Michigan, and the only question was whether the warrantless seizure was made upon probable cause. Chief Justice Taft said (p. 149) that "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . .", and he cited, as does the Government (brief, p. 14) the fact that the First Congress, contemporaneously with adoption of the Fourth Amendment, enacted the first customs statute.

But that argument from history, upon which the Government relies so heavily (brief, pp. 13-24), and which the Government contends justifies a border search "without probable cause or a warrant" (brief, p. 14), is of no avail to the Government in this case. Aside from the point (mentioned by the court below, Pet. App. 7a, n.5) that this Court has not hesitated to abandon even a position based on history, *there is in fact no argument from history where letter mail is concerned.*[5] Indeed, the argument from history cuts against the Government on the issue of letter mail, as we shall show.

[5] Even as to non-letter mail, it has been said that there are at least three objections ot the argument that the virtually simultaneous adoption of the first customs statute and the Fourth Amendment shows that the Fourth Amendment was not to operate in a border search. See Note, *Border Searches and the Fourth Amendment*, 77 Yale L.J. 1007 at 1011 (1968), developing the three objections.

It appears that the authority to open "envelopes" was not contained in any border search statute until 1866, when Rev. Stat. §3061, the predecessor form of the present border search statute (19 U.S.C. 482), was adopted. But then, for 105 years, as the Government's brief frankly tells us, pp. 20-21, Customs officers did not open sealed letter mail despite the apparent authorization in the statute. Not until 1971, see pp. 21, 23-4, did Customs officials do what they have done in this case, that is, open sealed letter mail without a warrant and without the consent of the addressee.

The "history" on which the Government relies, then, is a history of some three years under the present regulations before the 1974 seizure in this case was made.[6] Against that history lie 105 years under the statute and indeed the 200 years of this country's independence, during which time no such seizures were ever made, so far as we are informed. On analysis, the Government's "history" turns out to involve packages, parcels, and other means of importing merchandise. The question of letter mail is before this Court for the first time.

We conclude this portion of the argument by saying that even if there were a well-established history of warrantless searches of letter mail, authorized by a statute, that would be of no avail to the Government if the Constitution required a warrant. As this Court has often said, "no Act of Congress can authorize a

[6] It will be noted that with one exception, all the cases cited by the Government (p. 10, n.6) as having "considered the problem" are of recent vintage, indeed within the last three years. The only earlier case cited, *United States v. Beckley*, 335 F.2d 86 (6th Cir.) is a 1964 decision and is cited only as "dictum." In fact, the *Beckley* case involved a package weighing between 9 and 10 pounds, on which less than first class postage was paid.

violation of the Constitution." *United States v. Brignoni-Ponce*, 422 U.S. 873 at 877 (1975), quoting from *Almeida-Sanchez v. United States*, 413 U.S. 266 at 272 (1973).

3. There is no reason to suspend or abrogate the warrant requirement for letter-mail

The Government, in addition to its argument from history, presses on this Court the point that "compelling practical considerations" justify the opening of letter mail arriving from abroad, "even in the absence of probable cause." (Brief, p. 24) It is at this point that the Government attempts to overwhelm the Court with the non-record statements, attributed to the Customs Service, that "over one billion envelopes and 42 million packages entered the United States from abroad," during each of the last two fiscal years (pp. 24-5), and with other non-record statements concerning the burden on Customs officers.

The Government's argument concerning the magnitude of the problem it confronts, while surely not to be taken lightly, is not a substitute for the Constitution. Similar arguments are often made by prosecutors complaining that the Bill of Rights was interfering with vigorous enforcement of the law; indeed, the present argument is reminiscent of the Government's contention in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), that the staggering numbers of aliens seeking to cross the long borders of the United States was so serious a problem, in terms of practicability, that roving non-border searches by the Border Patrol without warrant or probable cause or consent should be upheld. This Court replied, 413 U.S. at 273:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power.

The words "border search" convey an idea of a kind of emergency situation, a concept of persons or vehicles crossing the border with the Government agents having only a brief moment to check the possible breach of law, and with few or no facilities to aid the Government. The argument for a historic "border search" exception to the requirements of the Fourth Amendment includes Border Patrol cases, as well as Customs Service cases, and conjures up a picture of threatened incursions by hordes of aliens, requiring immediate action by Government officers.

How different in mood and in dynamics is the situation of letter mail, involved in this case. Letters are not mobile; they will lie there until Constitutional requirements are satisfied. There is no emergency. Indeed, this Court in *United States v. Van Leeuwen*, 397 U.S. 249 (1970), sustained the authority of Government officers to detain first class mail for a period of 29 hours while they investigated the situation and obtained a search warrant. International letter-class mail, as the court below said (Pet. App. 10a), would appear (in the light of the *Van Leeuwen* holding) to present an *a fortiori* case for the right of Customs officials to detain such mail, investigate it, and if appropriate obtain a warrant.

The mobility of the item to be seized, its ability to evade capture if not seized at that moment, has always been a cardinal underpinning of an exception to the warrant requirement. Thus in *Carroll v. United States*, 267 U.S. 132, 151 (1924), sustaining a warrantless seizure of liquor in a moving automobile, where probable cause existed, the Court said:

> Thus, contemporaneously with the adoption of the 4th Amendment, we find in the first Congress, and in the following second and fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods *in course of transportation and in a movable vessel, where they readily could be put out of reach of a search warrant.* (Emphasis added)

The Court added, significantly (267 U.S. at 156): "In cases where the securing of a warrant is reasonably practicable, it must be used, . . ."

Over and over, this Court has given that same answer where the Government, as it often does, tells the Court that the practicalities of the situation, or concerns for national security, or the burdens that obtaining a warrant would impose, excuse it from the warrant requirement. A classic formulation of that answer was given in *United States v. United States District Court*, 407 U.S. 297, 321 (1972):

> Thus we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values.

The Government presents to this Court, in effect, the proposition that since it cannot be determined from merely scrutinizing the outside of an "envelope" whether or not it is a "letter," the Government should at the border be permitted to open a suspicious-looking envelope and see what is inside. If what is inside is what we normally term a "letter," then the Government is sorry; it will not read the correspondence; it will (presumably) reseal the envelope

and send it on. We believe this stands the Fourth Amendment on its head, rendering the recipients of overseas mail second-class citizens. This amounts to a presumption in favor of the Government that the overseas mail is in violation of the law; therefore all individual recipients must suffer. But, "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). The true rule is that the presumption is in favor of the individual; the Fourth Amendment protects him at all times, enhanced in cases such as this by the First Amendment; and letter-type mail addressed to him must be presumed to be "a letter." The Government, in seeking to defeat that presumption, must do so with the aid of a search warrant.

The Government has attempted, brief, p. 11, to de-fang the warrantless search here by telling the Court what this case "does not involve," and says that (since the search here "took place at a post office as the mail was entering the United States") the case does not raise any issue of whether that post office was the border or the "functional equivalent" of the border. But in fact the situation is not that simple. The letters involved in this case came into the country at Kennedy Airport, concededly the functional equivalent of the border, but Officer Kallnischkies, the Customs Officer who inspected the mail, was not working at the Airport; he worked in the General Post Office in New York City, and it was there—after the mail had been transferred from the Airport—that he opened and inspected the letters. (A. 29-30) In fact, Officer Kallnischkies had nine persons working under him at Kennedy Airport (in addition to nine others working under him at the General Post Office, A. 20), and thus the eight letters

involved in this case could have been inspected at the Airport. But they were transported to New York City, for the convenience of the Government, and that process might have been accomplished in one day or it might have taken longer, depending on various factors. (A. 38)

The letters were opened on Monday, February 4, 1974. (A. 44) But they arrived at the General Post Office on Saturday or at the latest on Sunday and were held there over the weekend. (A. 44) The Customs staff works a Monday to Friday week, and mail arriving on Saturday or Sunday is held for Monday inspection. (A. 45)

Putting these facts together, it is possible that the letters arrived at Kennedy Airport on Friday, were transported to the General Post Office over the weekend, and thus spent three days in the United States before being inspected by the Customs officials. That amounts to perhaps 72 hours, almost three times as much time as the 29 hours permitted by this Court in *United States v. Van Leeuwen*, 397 U.S. 249 (1970), for detaining first class mail in order to investigate and then obtain a search warrant. What is significant about the *Van Leeuwen* decision is the distinction it makes between the *detention* of the packages for 29 hours, which was the "only thing done here on the basis of suspicion," 397 U.S. at 252, and the *opening* of the packages, which was done only after a warrant was obtained. The Court said that no interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day they were deposited.

> The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained. 397 U.S. at 253.

The idea, then, of an emergency in this case, of a need to proceed without complying with the warrant requirement–in short, the entire justification for a "border search" exception–turns out to be nonexistent on the actual facts of the case.

Particularly instructive here is the decision of this Court in *United States v. United States District Court*, 407 U.S. 297 (1972). That was the case in which the Attorney General had authorized electronic surveillance (wiretaps) in internal security matters without obtaining prior judicial approval. The question answered (in the negative) in the case was the issue posed and reserved in *Katz v. United States*, 389 U.S. 347 at 358, n.23 (1968):

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security . . .

Mr. Justice Powell pointed out, 407 U.S. at 299, that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees" and said in language applicable to the case at bar:

> This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.

The "determination of this question," said the Court (407 U.S. at 309), "requires the essential Fourth Amendment inquiry into the 'reasonableness' of the search and seizure in question, and the way in which that 'reasonableness' derives content and meaning through reference to the warrant clause. Coolidge v. New Hampshire, 403 U.S. 443, 473-484, . . ."

The Government contended (in an argument parallel to the argument here) that the covertness and complexity of potential unlawful conduct, and the use by many conspirators of the telephone, made electronic surveillance an effective investigatory weapon, and that the Government is obligated to employ its electronic capability to preserve the security of the country. The Court said (407 U.S. at 312):

> But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy.

The Court held without dissent that the Fourth Amendment does require prior judicial approval for domestic wiretapping, even in internal security matters; that the Government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy and free expression; and that Fourth Amendment freedoms cannot properly be guaranteed if these surveillances are left solely to the discretion of the executive branch without the detached judgment of a neutral magistrate.

An important and inextricable part of the Court's decision, indeed the underpinning of the case, as in the case at bar, was the fact that First Amendment values ("constitutionally protected speech," 407 U.S. at 313) as well as Fourth Amendment rights were involved. "Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech." 407 U.S. at 320.

If we change, mutatis mutandis, the "national security" aspects of *United States v. United States District Court* into the "border search" aspect of this case, as a reason given for suspending Fourth Amendment requirements, we have almost an exact parallel. We should have the same result, implementing what this Court said in *Ex Parte Jackson*, 96 U.S. 727, 733 (1877):

> The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation. . . .

The Government's argument that it is impracticable to obtain search warrants for the great numbers of letters or letter-type envelopes that come in from abroad, a type of argument that is (as we have said) unfamiliar to this Court only in its particular setting of letter mail, not only encounters the legal barriers described above but also suffers seriously as to credibility upon the basis of the facts contained in this record. After the eight envelopes (the basis for the convictions here) were opened in New York without a warrant, three similar envelopes were forwarded to Washington, and the authorities in Washington were alerted. But before the authorities in Washington would open those envelopes, *they sought and obtained a search warrant*, having detained the envelopes for that purpose. (A. 80-81)

Indeed, we must also question the Government's answer to the suggestion of the Court of Appeals in this case (Pet. App. 16a) that not only is there nothing in the record to demonstrate the "impracticability" of obtaining a warrant for suspected letter mail, but there are actually available now a sufficient number of

devices or methods to detect narcotics in international letter mail, or at least to reduce the problem to manageable levels. The Court of Appeals mentioned "X-ray inspection, metal detectors, specially trained dogs, and the like," and suggested a streamlined method of presenting suspected mail to a magistrate (possibly on an oral record), who might—if the traffic warranted—even be stationed at border places where the mail is heaviest, such as Kennedy Airport or the New York Post Office. The Government, while not denying the availability of these methods, described them as having "limited value in detecting contraband" (brief, p. 25), and called it "speculation" for the Court of Appeals to state that trained dogs, metal detectors, and other devices could detect contraband more easily in envelopes than in packages (brief, p. 29).

As we noted at the beginning of this brief, the Government's statements concerning the efficacy of these methods have no basis in the record of this case. But we call to the attention of this Court the fact that the Solicitor General, as is shown in Exhibit 1 appended to this brief, supplied to counsel for the respondents a substantial number of Custom Service Forms 151, "reflecting seizures from both envelopes and packages" (as the Solicitor General's letter put it.[7] The fact is that each of the Forms 151 supplied to us shows that a trained dog sniffed out the contraband, from both "envelopes" and parcels. The contraband found in envelopes included hashish (sometimes in a cassette, or a plastic bag, or wrapped in writing paper,

[7] It is interesting to note that while the Solicitor General's letter (Exhibit 1) uses the term "envelopes," Form 151 itself—according to the code to be used—reflects "letter class" (designated by the letter L), and all of the 20 Forms 151 described by the Solicitor General as referring to "envelopes" are in fact coded "L".

or even wrapped in aluminum foil and wax paper); in parcels, it included marihuana inside a fruitcake tin, or in a plastic wrapping within a cardboard box; it included "amphetamines and unknown pills contained in plastic packets," or hidden in dried food material; it included marihuana inside a hollowed book sealed in plastic wrappings, or inside a hassock, or rolled in the center of a newspaper. We refrain from printing the many Forms 151 summarized above.

If trained dogs alone can detect contraband concealed in the manners shown above, and doubtless in many other ways, we believe—as the Court of Appeals believed—that the problem of practicability is far from the dilemma urged upon this Court by the Government. We agree with the court below that the problem is entirely manageable within Constitutional limits.

CONCLUSION

The judgment of the court of appeals should be sustained.

Respectfully submitted,

IRVING R. M. PANZER
1735 DeSales Street, N.W.
Washington, D.C. 20036
Telephone: 783-3391

Attorney for Respondent
James W. Kelly
(Appointed by this Court)

Office of the Solicitor General
Washington, D.C. 20530

December 17, 1976

Allen M. Palmer, Esq.
1707 N Street, N.W.
Washington, D.C. 20036

Re: United States v. Ramsey and Kelly, S. Ct. No. 76-167, October Term 1976

Dear Mr. Palmer:

In response to your letter of December 9, 1976, requesting copies of Customs Service Form 151, I asked the Customs Service to provide me with a number of these forms reflecting seizures from both envelopes and packages. The Customs Service has provided this material, and I am enclosing with this letter 16 Forms 151 reflecting seizures from parcels and 20 Forms 151 reflecting seizures from envelopes. The Customs Service has deleted from these forms material that might be used to identify the sender or intended recipient of the mail. These deletions have been made in conformity with the Privacy Act, but they should not hinder the use of the Forms you have in mind.

Each Form 151 contains the name of the customs officer who made the seizure and the name of his supervisor. The Customs Service has informed me that it has no objection if you desire to talk to any of these employees. You should feel free to reach them by telephone at the customs facility indicated on the face of the forms.

Sincerely,

BY HAND
Enclosures

Robert H. Bork
Solicitor General

cc: Irving R. M. Panzer, Esq.
1735 DeSales Street, N.W.
Washington, D.C. 20036

EXHIBIT 1

Supreme Court, U. S.
FILED
JAN 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES OF AMERICA,

Petitioner,

—v.—

CHARLES W. RAMSEY and JAMES W. KELLEY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MELVIN L. WULF
JOEL M. GORA
JACK D. NOVIK
HELENE M. FREEMAN
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-167

UNITED STATES OF AMERICA,

Petitioner,

v.

CHARLES W. RAMSEY and
JAMES W. KELLEY,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus[1/]

The American Civil Liberties Union is a nationwide, nonpartisan organization of

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1/ Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

over 250,000 members, dedicated solely to defending the principles embodied in the Bill of Rights to the Constitution. Central among those protections are the safeguards of privacy set forth in the Fourth Amendment. That Amendment erects a critical barrier between the government and the citizens, with well-defined procedures and standards which the government must follow whenever it seeks to intrude upon the "right of the people to be secure in their persons, houses, papers, and effects. . . ."

In recent years, the Fourth Amendment's barrier has, regrettably, been lowered considerably. The ACLU has repeatedly urged the Court to resist such "hydraulic pressures" to weaken the right of privacy which Mr. Justice Douglas warned against in Terry v. Ohio, 392 U.S. 1, 39 (1968). Now, once again, an assault on the Fourth Amendment is being made, this time in an effort to remove from the protections of the Fourth Amendment a whole category of governmental intrusions on privacy, namely, the privacy of international letter mail. We submit that the values protected by the Fourth Amendment, as additionally informed in this case by those interests protected by the First Amendment, require the rejection of this most recent effort to render the right of privacy largely meaningless.

Statement of the Case

This case involves the opening by customs officials of international letter mail without a search warrant. The mail so opened was found to contain a white substance believed to be heroin. The opening of the mail ultimately led to the arrest and conviction of the respondents. The Court of Appeals subsequently ruled that the warrantless search of the envelopes violated the Fourth Amendment and could not be justified by application of a "border search" doctrine, or by the asserted practical difficulties of obtaining search warrants. The Court of Appeals felt that its ruling was also required by the separate interests protected by the First Amendment.

Summary of Argument

The interests protected and the analysis required by the Fourth Amendment are fully applicable to this case. The fact that the focus of the inquiry is letter mail sent from abroad in no way alters that analysis.

The values of both the First and Fourth Amendments create a justifiable expectation of privacy in and the right to communicate through sealed international letter mail. Ex Parte Jackson, 96 U.S. 727 (1878); Procunier v. Martinez, 416 U.S. 396 (1974); Lamont v. Postmaster General, 381 U.S. 301 (1965).

Searching international letter mail without a warrant is per se unreasonable under the Fourth Amendment and does not fall within any of the "jealously drawn" exceptions to that requirement. Camara v. Municipal Court, 387 U.S. 523 (1967); Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. United States District Court, 407 U.S. 297 (1972). Moreover, insisting on a warrant requirement would not frustrate the achievement of important governmental purposes. And any inconvenience of a warrant requirement cannot justify dispensing with it. Similarly, reliance cannot be placed on the good faith of the customs officials, with post-search judicial review the only safeguard employed.

The interests in free communication protected by the First Amendment provide additional and powerful reasons for adhering to Fourth Amendment requirements where international letter mail is concerned. Procunier v. Martinez, supra; Lamont v. Postmaster General, supra. The procedural safeguards associated with attempted restrictions on communication, plus the requirement that the least drastic alternatives be employed, combine to require that Fourth Amendment safeguards be honored. Roaden v. Kentucky, 413 U.S. 496 (1973); Shelton v. Tucker, 364 U.S. 479 (1960).

International letter mail should not be opened in the absence of probable cause, a standard readily applicable to such mail.

The factors and conditions which have been used to justify "border searches" of incoming travellers, without search warrants or probable cause, are inapplicable to and do not justify the warrantless searching of international letter mail. United States v. Martinez-Fuertes, 96 S.Ct. 3074 (1976); United States v. Ortiz, 422 U.S. 891 (1975); Terry v. Ohio, 392 U.S. 1 (1968).

Finally, should it be necessary to reach the question, we submit that there should be no total "border search" exception to the normal requirements of the Fourth Amendment. That Amendment requires a much more discriminating inquiry into the nature of and reasons for departing from normal standards in a particular category of cases. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

ARGUMENT

THE OPENING OF INTERNATIONAL LETTER MAIL WITHOUT A WARRANT AND PROBABLE CAUSE VIOLATES THE FOURTH AMENDMENT

Introduction

The interests protected by the Fourth Amendment are squarely involved in this case and severely jeopardized by the Government's assertions. The purpose of the Fourth Amendment is "to maintain inviolate large areas of personal privacy." Mapp v. Ohio, 367 U.S. 643, 657 (1961). It protects the people

wherever they harbor a justifiable expectation of privacy, whether on a public street, Terry v. Ohio, 392 U.S. 1 (1968), or in a pay telephone booth. Katz v. United States, 389 U.S. 347 (1967).

Just as the Fourth Amendment's protections belong to all people, its prohibitions act as a bar to all governmental invasions of protected privacy. As the Court stated nearly a century ago, the Fourth Amendment applies:

> ...to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.... Boyd v. United States, 116 U.S. 616, 630 (1886).

Moreover, its reach extends beyond our national boundaries, restraining governmental conduct abroad as well as at home. See, e.g., Reid v. Covert, 354 U.S. 1, 6, 8-9 (1957); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976). As the Court stated in Reid v. Covert, supra at 5-6:

> [W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. (footnotes omitted)

The issues in this case must be addressed with these principles in mind. But the Court should also bear in mind that the Fourth Amendment safeguards sought to be imposed here would not prohibit all searches of international letter mail, but only those which are "unreasonable," i.e., not based upon a warrant and probable cause. The Fourth Amendment has struck the balance between the privacy of the individual and the interests of the state. We only ask that that balance be honored and respected.

A. The values of the Fourth Amendment, informed by those of the First Amendment, create a justifiable expectation of privacy in sealed international letter mail.

Despite the Government's assertions,

both the sender and the recipient have a substantial interest in preserving the privacy of international communication by letter. See Procunier v. Martinez, 416 U.S. 396, 408-09 (1974). The existence of a protected interest in privacy of communication through domestic mail has long been recognized:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to

> the great principle embodied in the fourth amendment of the Constitution." Ex Parte Jackson, 96 U.S. 727, 733 (1878).

In the century since then, the right to private communication by mail has been scrupulously protected by this Court against all forms of abridgement. See, e.g., Procunier v. Martinez, supra; Blount v. Rizzi, 400 U.S. 410 (1971); United States v. Van Leeuwen, 397 U.S. 249 (1970); Lamont v. Postmaster General, 381 U.S. 301 (1965). Each of these cases recognizes that there is a substantial intrusion on speech protected by the First Amendment when the government opens mail. As Justice Holmes stated: "[T]he use of the mails is almost as much a part of free speech as the right to use our tongues." United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921)(dissenting opinion).

The mail is as important a vehicle of communication as the telephone. The government can no more invade the privacy of communication by the former than it can by the latter. See Katz v. United States, supra. The First Amendment guarantees the right to receive information via both public and private media. E.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-90 (1969); United States v. United States District Court, 407 U.S. 297, 314 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Lamont v. Postmaster General, supra. Knowledge that the omnipresent eye of the

government is free to peer into private correspondence in its unfettered discretion may deter free communication by letter.[1] Thus, the First Amendment combines with the Fourth to protect written correspondence from unjustified intrusion. See Procunier v. Martinez, supra at 408, 409; Lamont v. Postmaster General, supra.

Nor is a contrary result required by the mere fact that mail has crossed our borders instead of our country. The individual interest in shielding correspondence from the unwanted government eye remains the same. International communication of ideas may be as important to free speech as domestic and is entitled to the protections of the First and Fourth Amendments. See, Lamont v. Postmaster General, supra.

Likewise, the governmental interest which justifies the intrusion is the same whether the object of search is domestic or international mail - the general interest in law

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1/ That the envelopes in question here contained no correspondence is not relevant. The rule which the government seeks would apply to all envelopes travelling in international mail regardless of their contents. Giving weight to this fact in effect would be justifying the search by what is turned up, an analysis this Court has steadfastly refused to accept. See, e.g., Sibron v. New York, 392 U.S. 40, 63 (1968); Henry v. United States, 361 U.S. 98, 103 (1959).

enforcement. No less than international mail, domestic mail may often be employed to facilitate criminal enterprises.[2] If the generalized interest in effective law enforcement does not justify blanket invasion of the privacy of domestic mail, it cannot justify such invasion of international mail.

Mail, of course, is not immune from all inspection. When the government has demonstrated that a search of any letter mail is required, individual privacy interests must yield. But it is the Fourth Amendment which must provide both the standard and procedure for determining when the government has made such a showing.

B. The Search of International Letter Mail Without a Warrant is per se Unreasonable.

The "most basic constitutional rule in this area is that '...searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment - subject only to a few specifically established

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2/ Many statutes make it a crime to use the mails for certain purposes. See, e.g., 18 U.S.C. §§871 (use of mails to threaten life of President or his successors), 876 (use of mails for threatening communications), 1461, 1737 (mailing obscene or crime-inciting material), 1952 (use of mail in furtherance of unlawful activity), 2101 (use of mail to incite riot).

and well-delineated exceptions.' The exceptions are 'jealously drawn,' and there must be 'a showing by those who seek exemption... that the exigencies of the situation made that course imperative.'" Coolidge v. New Hampshire, 403 U.S. 443 at 454-55 (1971).

The search of international letter mail does not fall within any of the heretofore known, "jealously drawn" and "well-delineated" exceptions to the warrant requirement.3/ Indeed, warrantless search of domestic mail is prohibited, Ex Parte Jackson, supra, and unauthorized detaining and opening of first-class domestic mail is subject to criminal sanctions. 18 U.S.C. §§1701-03.

The Government is asking this Court to create a new exception to these rules by insisting on the claimed importance of searching international mail. However, as this Court has consistently made clear:

3/ See, e.g., United States v. Robinson, 414 U.S. 218 (1973)(search incident to arrest); Chambers v. Maroney, 399 U.S. 42 (1970)(automobile search); Terry v. Ohio, 392 U.S. 1 (1968)(self-protective weapons pat-down); Harris v. United States, 390 U.S. 234 (1968)(plain view); Warden v. Hayden, 387 U.S. 294 (1967)(hot pursuit); Zap v. United States, 328 U.S. 624 (1946)(consent).

> "[T]he question is not at this stage..., whether these inspections may be made, but whether they may be made without a warrant. . . . In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant...." Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

The need to search is not determinative of the legality of a warrantless search. Rather, under the cases, the Court has looked to whether a warrant proceeding would frustrate achievement of the governmental purpose behind the search. E.g., United States v. United States District Court, supra at 315; Camara v. Municipal Court, supra at 533. Amicus submits that subjecting the inspection of international letter mail to the warrant requirement will not frustrate any legitimate governmental interest and is required by the Fourth Amendment as well as by the First.

1. It is possible to obtain a warrant prior to opening international letter mail.

The fundamental rule of this Court's Fourth Amendment jurisprudence is that if it

is possible to obtain a warrant, a warrantless search is constitutionally prohibited. Terry v. Ohio, supra at 20. And this is so even in areas traditionally exempt from the warrant requirement. See, e.g., Coolidge v. New Hampshire, supra, cf., Roaden v. Kentucky, 413 U.S. 496 (1973).

It is possible to obtain a warrant prior to opening international letter mail. Such mail is in the possession and control of postal authorities until it is delivered to the addressee. It cannot be removed from the point of entry except by postal authorities. The Court has held that with respect to sealed mail the right of privacy lies in the secrecy of the contents, and brief detention to obtain a search warrant has been held to be constitutionally tolerable. United States v. Van Leeuwen, supra. Since there is no danger of removal before a warrant may be obtained, there is no need to search without a warrant. The Government does not and cannot argue that the exigencies of international letter mail searches make it "imperative" to dispense with the warrant requirement. Nor does it argue that imposing a warrant requirement on these searches would have the necessary effect of frustrating the purpose for undertaking the searches. For these reasons alone, this Court should refuse to create the exemption sought.

Instead, the Government argues only that the opening of international letter mail ought not to be subject to the warrant

requirement because it would be impractical and inconvenient to obtain a warrant, that customs officials do not open mail which appears to contain only correspondence and that the individual interest can be adequately protected in subsequent judicial proceedings. The history of this Court's decisions interpreting the Fourth Amendment compel the rejection of each of these arguments.

With respect to the Government's claim of inconvenience, we have no doubt that the present practice of opening mail in the unfettered discretion of the customs inspector is more convenient than adherence to the Fourth Amendment. Yet, this Court has never recognized the convenience of law enforcement authorities as a legitimate consideration in applying the Fourth Amendment. The Fourth Amendment "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." United States v. United States District Court, supra at 315. Nearly 30 years ago this Court answered the government's argument pressed here:

> "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons...." Johnson v. United States, 333 U.S. 10, 15 (1948).

When practicality and convenience become the measure of the duty to obtain a search warrant, the Fourth Amendment will cease to exist. As this Court stated in Reid v. Covert, supra:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefits of a written Constitution and undermine the bases of our Government. 354 U.S. at 14. 4/

2. The Fourth Amendment requires a prior judicial determination that search is justified.

The protection of the Fourth Amendment

4/ The Government's convenience argument turns on their claim that each of the 62 customs inspectors who each open an average of 19 letters per day would be unable to do so if they had to get a warrant for each letter. We suspect that the number of letters which inspectors felt the need to open would diminish if they had to obtain a warrant. But, in any event, the inconvenience required to prepare and submit applications for warrants to search such mail cannot displace the requirements of the Fourth Amendment.

consists in requiring that a neutral, judicial officer determine when a search is justified. An executive branch officer engaged in ferretting out customs law violations is not the detached magistrate contemplated by the Constitution:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute.... But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.
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> * * * *
>
> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.
>
> United States v. United States District Court, supra at 317 (footnote omitted).

Searches conducted without warrants have repeatedly been held unlawful despite the fact that there was probable cause and the search was reasonably limited in scope. See, e.g., Coolidge v. New Hampshire, supra; Katz v. United States, supra. Even a search authorized by the President and purportedly undertaken for the weighty purpose of safeguarding national security cannot go forward

absent a warrant issued by a neutral, judicial officer. United States v. United States District Court, supra.

The government argues that because customs officers do not open mail containing only correspondence and that they do not read any correspondence in mail opened, the warrant requirement is unnecessary. In effect, this argument is that the initiation and scope of the search of mail ought to be subject only to the good faith discretion of the customs officers. However, this Court has consistently refused to make good faith the measure of the Fourth Amendment. "[S]imple 'good faith on the part of the arresting officer is not enough.'... If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effect,' only in the discretion of the police." Terry v. Ohio, supra at 22 (quoting from Beck v. Ohio, 379 U.S. 89, 97). The whole instinct of the Court's Fourth Amendment jurisprudence is opposed to such reliance on the good faith of law enforcement officials to respect the citizen's right to privacy. See, e.g., United States v. United States District Court, supra.

Similarly, the Court has resolutely refused to accept post-search judicial review as a substitute for objective, judicial predetermination of probable cause. See, e.g., United States v. United States District Court, supra; Katz v. United States, supra. The purpose of the warrant requirement is to prevent unjustified intrusions upon the privacy of citizens. Chimel v. California, 395 U.S. 752, 767, n. 12 (1969). This purpose cannot be accomplished by after-the-fact judicial review. When the Court departs from strict adherence to the warrant requirement, the innocent suffer along with the guilty, because all have been subjected to the indignity of a search without judicial authorization or just cause. Yet for those whose opened mail is found to contain no contraband, there is, in practical terms, no post-search judicial review.

An additional infirmity of post-search judicial review is its unreliability. The accuracy of the customs inspector's recollection of his actions cannot be tested for he is the only witness to the search. Also, after-the-fact justification of the search is likely to be strongly influenced by hindsight.

3. Adherence to the Warrant Requirement would not frustrate the Governmental purpose in undertaking the search of mail.

It is clear that the opening of letter mail entails a substantial intrusion on individual rights and that it is feasible to obtain a warrant before undertaking the search. The sole question remaining is whether imposing a warrant requirement would frustrate the governmental purpose justifying the search either because a search will not be possible if not done immediately or a delayed search will not effectuate the intended purpose.

For example, since an automobile may easily be removed from the jurisdiction before a warrant may be obtained for its search or seizure, if a warrant requirement were imposed on automobile searches the practical result would be to prohibit such searches. See Chambers v. Maroney, 399 U.S. 42 (1970). Likewise, the purpose of a weapons pat-down is to protect a police officer from attack, and if such law enforcement activity were delayed until a warrant could be obtained, the purpose would be frustrated. Terry v. Ohio.

It is apparent, however, that imposing the warrant requirement on customs inspection of letter mail would not in any comparable way frustrate the purposes underlying those searches. There is no danger that mail would disappear before a warrant can be obtained and no need for immediate search. Moreover, assuming that such searches must be based on probable cause, the warrant requirement does not impose any insuperable impediment to effective customs law enforcement, because the authority to undertake warrantless searches is no greater than the authority to search with a warrant. Thus, facts amounting to probable cause for a warrantless search will always justify the issuance of a search warrant. Requiring customs officials to make such a showing to a magistrate will not inherently frustrate the governmental purposes sought to be served.

C. Strict adherence to the warrant requirement is also required by the interests protected by the First Amendment.

Where constitutionally protected speech is involved, the Court has required rigorous adherence to the commands of the Fourth Amendment. E.g., Roaden v. Kentucky, supra; United States v. United States District Court, supra; Stanford v. Texas, 379 U.S. 476, 485 (1965). The First Amendment "calls for a higher hurdle in the evaluation of reasonableness" and the Fourth Amendment warrant requirement is stringently applied because it is necessary to "examine what is 'unreasonable' in the light of the values of freedom of expression." Roaden v. Kentucky, supra at 504. We deal here with letter mail, not crates of machinery. Thus, even if the Fourth Amendment alone did not compel adherence to the warrant requirement, in this context, in conjunction with the First Amendment, it would.5/

The permissibility of governmental action which arguably impinges on free speech under the First Amendment must be determined by reference to a number of rigorous criteria and careful inquiries. See, e.g., Procunier v. Martinez, supra at 411. Yet, the government's argument here seems to be that the inquiry ends once it is determined that the imposition and

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5/ Pornography is the primary contraband seized as a result of these searches. Br. for Petitioner, Appendix B.

collection of customs duties and the exclusion of contraband are within the enumerated powers of the Federal government and that opening international mail is reasonably related to the exercise of this power. But these factors only begin the inquiry, they do not resolve it. See Lamont v. Postmaster General, supra. Notwithstanding that challenged governmental action furthers a substantial, legitimate governmental purpose, under the First Amendment "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted).

The statistics cited by the government show that a large group of innocent people have the privacy of their correspondence invaded each day in order to detect a small minority of lawbreakers. The present practice thus broadly burdens protected speech in which the government has no legitimate interest. Such overbreadth is impermissible where there are alternatives to unrestricted mail opening which are less intrusive on individual rights yet as effectively prevent the importation of contraband and merchandise upon which duty has not been paid.

First, it is extremely important to note that, prior to 1971, the opening of international letter mail without the written consent

of the addressee was prohibited. Under then-applicable regulations, when mail was received without written authorization for pre-delivery opening, customs officials were required to send a notice to the addressee requesting written permission for opening the mail. If such consent was not received, the mail was to be treated as undeliverable. 19 C.F.R. §9.5 (1971). Pertinent postal regulations correspondingly required that:

> Sealed letters and letter packages should bear a green label (Form C1) or an endorsement permitting the customs officer to open the article for examination. In the absense of a label or endorsement, the post office will obtain the addressee's signed authority for opening on Form 2921. "Held Notice - International Mail." If such authority is not granted within 15 days after the first notice, send a second notice. If no response is received after an additional 15 day period, endorse the article "Unclaimed" and return it to origin. 39 C.F.R. §261.3 (1971).

While this procedure was highly questionable under the First and Fourth Amendments - since it permitted a seizure, if not a search, without a warrant or probable cause, it denied addressees their mail in the unfettered discretion of administrative officials, and it encouraged coerced consent to opening - the

very fact that such a cumbersome procedure was employed by the government undermines the contention that requiring a search warrant procedure would unduly burden governmental purposes.

Second, and accordingly, there is the alternative of the warrant requirement applied by the Circuit Court. As has been noted, there is no danger that mail will be delivered to the addressee before a warrant can be obtained, and a warrant may be obtained for the search of any mail for which a search may be constitutionally undertaken. Communication by mail would thereby be protected by the determination of a judicial officer. And, as a practical matter, one would expect that customs inspectors would limit their applications for a warrant to those envelopes which were reasonably likely to contain prohibitable merchandise. This judicial screening and customs self-screening would narrow the sweep of mail openings, and thus more probably confine searches to those items of legitimate governmental concern. In terms of freedom of expression "[b]y no means of least importance will be the reassurance of the public generally that indiscriminate...[mail-opening] of law-abiding citizens cannot occur." United States v. United States District Court, supra at 321. In light of recent revelations of widespread opening and monitoring of outgoing and incoming international correspondence by the CIA, this consideration assumes even greater significance.

D. Probable cause is required for the opening of international letter mail.

As the Fourth Amendment's warrant requirement provides the procedure for determining when the governmental need to search outweighs the individual right to privacy, the probable cause requirement provides the standard for determining when that point is reached.

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. Chambers v. Maroney, supra at 51.

See also United States v. Ortiz, 422 U.S. 891 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

It is readily apparent that the Customs Service does not and probably could not open all of the more than one billion envelopes entering this country from abroad. Nor is there any legitimate governmental need to open mail which contains only correspondence. Therefore, there must be some basis for distinguishing those envelopes for which there is a governmental need to search. Under the Fourth Amendment the standard for selection must be an objective one: "would the facts available to the officer at the moment of

the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, supra at 22. Inarticulate hunches are insufficient justification for intruding on constitutionally protected rights. Id.

The only fact which can justify the belief that it is necessary to open an ordinary letter-size envelope is probable cause to believe that it contains something other than correspondence. The probable cause standard may be meaningfully applied to searches of international letter mail. The size, shape, weight[6] and feel[7] of the envelope, its source and the addressee[8] are all readily determinable and are arguably relevant to the determination of whether it is reasonable to believe prohibited or dutiable merchandise is contained therein.

The government indicates that many mail openings are predicated on mere suspicion and

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6/ See, e.g., United States v. King, 517 F. 2d 350 (5th Cir. 1975).

7/ See, e.g., United States v. Francis, 487 F.2d 968 (5th Cir. 1973), cert.denied, 416 U.S. 908 (1974).

8/ See, e.g., United States v. Van Leeuwen, 397 U.S. 249 (1970); United States v. King, 517 F.2d 350 (5th Cir. 1975).

these searches would be precluded if a showing of probable cause were required. Yet this is precisely the function which the probable cause standard serves - preventing unjustified intrusion upon privacy. Under current practice only 15.7% of all letter openings result in finding contraband or dutiable items. The vast majority of letters are needlessly opened. Thus, raising the standard to exclude those envelopes which are not likely to contain merchandise is appropriate.

The point is that there is nothing about the search of international letter mail which renders use of the traditional probable cause standard inapplicable or unduly burdensome.

E. The opening of international letter mail cannot be justified as a "border search."

Although we believe that there is no "border search" exception to the Fourth Amendment, see infra, pp. 31-38, even if the common practice of cursorily inspecting incoming luggage at the border is an exception to the general rule that searches conducted without probable cause and a warrant are per se unreasonable, the nature of the search of international letter class mail is such that it does not fall within this exception. Numerous factors distinguish the usual border search from the search of international mail. While inspection of the effects of foreign travellers is a longstanding practice, customs inspectors have been opening international letter mail without consent of the

addressee only since 1971. Thus, while a returning traveller might expect a minimal customs inspection on entering the country, a recipient of international correspondence does not expect that his mail is likely to be opened. The presence or absence of awareness that inspection will occur may effect the degree of perceived intrusion. Cf. United States v. Martinez-Fuerte, 96 S.Ct. 3074 (1976); United States v. Ortiz, supra.

Another difference is the degree to which discretion is exercised in the decision to undertake a search. In the ordinary border search, all those persons crossing the border are, or should be, initially subject to the same degree of intrusion. There is at the outset no discretion exercised by the individual customs officer. On the contrary, considerable discretion is exercised by customs officers in determining which international letter mail to open.9/ This Court has considered the element of discretion to select the subject of search a significant factor in determining the applicability of the Fourth Amendment's probable cause requirement. E.g., United States v. Ortiz, supra.

9/ According to the government only 1 in 4,000 envelopes are opened for inspection. Br. for Petitioner, 26.

In addition, ordinary border searches are conducted in the presence of the property owner, who can observe the conduct of the inspection and can object to unnecessary, especially intrusive or arbitrary exercises of the power to inspect. Should question arise of the reasonableness of the official action taken, the aggrieved person will be able to give his or her account of the proceedings. Post-search adversarial judicial review is thus possible. International letter mail openings, in contract, are conducted in secret. There is no one present to oversee the conduct of the search. Post-search judicial review is impeded because the veracity of the customs officer's account of the cause for and the conduct of the search cannot be tested. Cf. United States v. Wade, 388 U.S. 218 (1967).

In the ordinary border search of baggage, two objective facts are in the possession of the customs inspector: that an international border has been crossed and that merchandise is present. In terms of the probable cause equation, only one element is missing - whether that merchandise includes contraband or dutiable goods. The skilled customs officer can observe the behavior of the owner of the baggage and glean further objective facts tending to indicate unlawful conduct. For example, the person may appear nervous or he may respond evasively to the customs officer's inquiries. This sort of evidence and the inferences drawn therefrom may be highly relevant in determining the reasonableness of the

search. See Terry v. Ohio, supra; United States v. Gil de Avila, 468 F.2d 184 (9th Cir. 1972), cert. denied, 410 U.S. 958 (1973). On the other hand, with respect to the search of international letter mail, only one objective fact is always in the possession of the customs inspector - the crossing of an international border. He cannot observe the recipient's behavior. Thus, in conventional probable cause analysis, the search of letter mail proceeds on a lesser showing of justification.

There is a final critical distinction between the usual border search and the opening of international letter mail - the ability to secure a warrant prior to undertaking a search. See Camara v. Municipal Court, supra. When an international traveller presents himself at the border with his baggage, an immediate search is required lest the baggage be removed before a warrant can be obtained. Although arguably the baggage could be seized and held until a warrant is obtained, such a course may well be more intrusive and inconvenient to the traveller than immediate inspection. Cf. Chambers v. Maroney, supra. As has been noted, there is no danger of removal of letter mail before a warrant may be obtained. Immediate search is, therefore, not necessary.

These distinctions between the nature of and reasons for the usual border search and the search of international letter mail take the latter out of the purported border search

exception. Any exceptions to the Fourth Amendment warrant requirement have been scrupulously confined to the circumstances justifying exemption. See, e.g., Roaden v. Kentucky, supra; Coolidge v. New Hampshire, supra. Ritualistic incantation of the words "border search" can no more dissolve the proscriptions of the Fourth Amendment than the words "search incident to arrest," "automobile search," or "national security." Where, as here, the facts and circumstances do not make warrantless search "imperative" there is no justification for departure from the Fourth Amendment's warrant requirement.

F. There should be no "border search" exception to the Fourth Amendment.

Finally, even if the opening and inspection of international letter mail is considered a "border search," this Court has never held that there is a blanket exception to the Fourth Amendment for such searches. Rather, we submit, proscriptions of the Fourth Amendment should apply with equal force to searches conducted at our national borders.

The Court has never held any law enforcement procedure involving an interference with individual liberty and privacy exempt from the Fourth Amendment.[10] Though the specific content and incidents of rights guaranteed by the

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Please see next page for footnote 10.

Fourth Amendment may vary depending on the context in which they are asserted, the proscription of unreasonable searches and seizures, defined with reference to the warrant and probable cause requirements, must be applied. E.g., United States v. Ortiz, supra; Almeida-Sanchez v. United States, supra. Nonetheless, relying on dicta in opinions of this Court,[11] some lower federal courts held that traditional Fourth Amendment principles do not apply to searches conducted by customs officers at the border and that these "border searches" may be conducted in the absence of probable cause or reasonable suspicion.[12]

10/ Former cases holding particular practices not subject to the Fourth Amendment have been overruled. See, e.g., Olmstead v. United States, 277 U.S. 438 (1928) overruled in Katz v. United States, 389 U.S. 347 (1967); Frank v. Maryland, 359 U.S. 360 (1959) overruled in Camara v. Municipal Court, 387 U.S. 523 (1967). But cf. Wyman v. James, 400 U.S. 309 (1971).

11/ See, e.g., United States v. 12 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123, 125 (1972); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971); Carroll v. United States, 267 U.S. 132, 154 (1924).

12/ See, e.g., United States v. Milroy, 538 F.2d 1033 (4th Cir. 1976); United States v. Barclift, 514 F.2d 1073 (9th Cir.), cert. denied, 423 U.S. 842 (1975); United States v. Bolin, 514 F.2d 554 (7th Cir. 1975).

In effect, the rule applied by these courts and now urged on this Court is that any search conducted at the border is reasonable under the Fourth Amendment by that fact alone.

One justification proferred for this sweeping and unlimited license to search persons and their effects is the long history of the practice. But a constitutional violation does not become legitimated by virtue of the fact that it has been long practiced. See Brown v. Board of Education, 347 U.S. 483 (1954). And the same is true in the Fourth Amendment area as well. See United States v. United States District Court, supra; Camara v. Municipal Court, supra. More relevant, however, is the historical basis of the Fourth Amendment and the abusive practices which led to its adoption.[13] The Fourth Amendment, in substantial part, grew out of the colonial experience with attempts to enforce the English customs statutes. General warrants, called writs of assistance, were issued to customs officials conferring on them unlimited discretion to search for goods on which customs duty had not been paid. See N. Lasson, History and Development of the Fourth Amendment, Ch. 2

13/ The Fourth Amendment "must be read in light of 'the history that gave rise to the words...'." Chimel v. California, 395 U.S. 752, 761 (1969), quoting from United States v. Rabinowitz, 339 U.S. 56, 69 (1950)(Frankfurter, J., dissenting).

(1937). Opposition to the writs of assistance came to a head in 1761 with James Otis' landmark attack on the general writs in Lechmere's Case. Otis described the writs as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English lawbook." B. Schwartz, The Bill of Rights: A Documentary History 189 (1971). So strong was the colonial opposition to the writs of assistance that John Adams was later to write of Otis' argument, "American independence was then and there born." 10 J. Adams, Works 247.

Thus, if there is any lesson to be drawn from history, it is that general searches by customs officers were considered by our founding fathers as attributes of tyranny and oppression. Fresh with the recollection of the writs of assistance, they enshrined in the Bill of Rights a prohibition of warrantless searches on mere suspicion. See Ker v. California, 374 U.S. 23, 46-64 (1963). The power to conduct border searches which the government seeks here is precisely the power which the founding fathers meant to forever deny the federal government.

The governmental interest allegedly justifying exempting border searches from Fourth Amendment inquiry is the practical need for searches to prevent the smuggling of contraband and dutiable merchandise. The interest in enforcement of the customs and import laws, however, is no more compelling than the interest in enforcement of any other laws. There is a strong interest in preventing bank robbery, yet it cannot seriously be contended that law enforcement officers could stop and search everyone who enters a bank. See Camara v. Municipal Court, supra at 535. Likewise, there are substantial difficulties in enforcing our immigration restrictions, yet the Court refused to dispense with the Fourth Amendment's requirement of probable cause solely on this ground. In Almeida-Sanchez v. United States, the Court said:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certan exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. 413 U.S. at 273.

Underlying the argument in favor of a general exception for border searches is the erroneous assumption that the Fourth Amendment embodies an all-or-nothing approach and thus that all border searches must be reasonable if any border search is. But the constitutional inquiry of reasonableness under the Fourth Amendment is much more discriminating than that. See, e.g., Terry v. Ohio,

supra at 17-18. Recognizing that there are differing degrees of intrusiveness, the Fourth Amendment proceeds as much by limitations on the scope of search as upon its initiation. See Chimel v. California, supra.

When viewed in this context, it is apparent that there are a great variety of encounters between government officials and individuals subsumed within the general rubric of "border searches." Involving, as they do, qualitatively different intrusions on privacy, they should be analyzed separately for Fourth Amendment purposes. Border encounters may be ranged along a continuum relative to their intrusiveness. At one end is the relatively unobtrusive practice of briefly stopping individuals seeking to enter the country from abroad to inspect their passpoarts or other identifying documents. The intrusion entailed by this practice may be so minimal that it is reasonable to stop all those crossing the border without a warrant, probable cause or even particularized suspicion. Cf. United States v. Martinez-Fuerte, supra. At the other end of the continuum are strip searches and body cavity searches, which are so substantial an intrusion on individual privacy and so offensive that they ought not be permitted absent a search warrant issued on the basis of probable cause to believe contraband is concealed on or in the body.[14/] Between these

14/ See, United States v. Cameron, 538 F.2d 254, 258-60 (9th Cir. 1976); Huguez v. United States, 406 F.2d 366, 382, n. 84 (9th Cir. 1968).

two extremes lie cursory visual and tactile inspection of luggage and the unrestrained thoroughgoing and intensive general search of one's person, property and effects. The power to rummage unrestrainedly through luggage, emptying its contents and minutely examining every article, does not necessarily flow from conceding the authority to superficially examine luggage. See Chimel v. California, supra; Terry v. Ohio, supra at 25-26, 28-30; Sibron v. New York, supra at 65-66, 67.

For example, if the ordinary letter-size envelopes involved in this case had been carried into the country in the luggage or on the person of a returning traveller, they could not have been opened and their contents inspected without particularized reason. These ordinary letter-size envelopes probably would not be uncovered absent an unrestrained thoroughgoing general search of the person, his effects and all the contents of his luggage. Even if they would be uncovered, the probability that they contained contraband or merchandise subject to duty is so minimal as to make it unreasonable to open them. Amicus submits that such an intensive general search must be predicated on probable cause to believe that a given individual is engaged in smuggling and that individual containers carried within luggage may be searched only if their size, shape, and other physical characteristics taken together with other facts known to the customs officer make it reasonable to believe that they contain contraband or undeclared merchandise subject to duty.

Similarly, this Court has been sensitive to distinctions in intrusiveness in the closely related area of attempts to enforce our immigration laws. Searches of vehicles, whether by roving patrols or at fixed checkpoints, have been held impermissible in the absence of probable cause to believe here are present aliens who have unlawfully entered the United States. United States v. Ortiz, supra, Almeida-Sanchez v. United States, supra. Brief stops for investigation by roving patrols must be predicated on reasonable suspicion of violation of law, United States v. Brignoni-Ponce, 422 U.S. 873 (1975), but the Court has held that investigatory stops at fixed checkpoints need not be so supported at all. United States v. Martinez-Fuerte, supra.

The point is that concentrating on the label "border search" diverts attention from the appropriate inquiry under the Fourth Amendment - "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Terry v. Ohio, supra at 19. To determine reasonableness it is necessary, inter alia, to balance the need to search against the intrusion on privacy which search entails. Camara v. Municipal Court, supra at 536-37. How that balance is struck differs depending on the degree of intrusion, the degree to which discretion is exercised, and the opportunity to obtain a warrant. The fact that a search occurs at the border ought not to immunize it from this sensitive, judicial, constitutional review.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
JACK D. NOVIK
HELENE M. FREEMAN
American Civil Liberties Union
22 East 40th Street
New York, NY 10016

Attorneys for Amicus Curiae

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